SUPREME COURT, U.S.
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No.

In the Supreme Court of the United States

SOUTHERN BUILDING CODE CONGRESS INTERNATIONAL, INC.,

Petitioner,

v.

PETER VEECK D/B/A REGIONAL WEB,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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159 pp

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QUESTIONS PRESENTED

Petitioner is a not-for-profit organization whose members are state and local governments and agencies as well as architects, engineers, builders, and manufacturers. It creates copyrighted "standard codes" to be adopted as technologically current, uniform requirements to be used by architects, engineers and builders. Its standard codes have been adopted through "incorporation by reference" by federal agencies and thousands of state and local governments throughout the country. Like other not-for-profit organizations that develop model codes and standards, petitioner supports this service by obtaining revenue from the sale of its copyrighted materials.

Respondent purchased from petitioner a copy of certain codes that had been incorporated by reference in the local building requirements of two Texas towns. Despite the restrictions in the copyright license, he posted the copyrighted material on his website. This litigation concerning the enforceability of petitioner's copyrights followed. On rehearing *en banc*, the Fifth Circuit, in conflict with other circuits, held by a 9-6 vote that such privately-authored standard codes, once adopted by governments, lose their copyright protection. The important questions thus posed are:

1. Are not-for-profit organizations that create copyrighted model codes and standards divested of their rights under the Copyright Act when a federal agency or a state or local government adopts requirements that incorporate the copyrighted material by reference?

2. Is there a due-process "right of access to the law" that invalidates the statutory copyrights of privately-developed model codes and standards once governments incorporate them by reference, even when the model codes and standards are widely and readily accessible to potential users on reasonable terms?

RULES 29.6 AND 14.1 STATEMENT

Petitioner Southern Building Code Congress International, Inc., is a not-for-profit corporation and has no parent corporation or outstanding stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULES 29.6 AND 14.1 STATEMENT ii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

STATEMENT 1

1. *SBCCI and other code-writing organizations.* 1

2. *Widespread and easy availability of the codes.* 2

3. *Veeck's infringement of SBCCI's copyrights.* 4

4. *Decision below.* 5

REASONS FOR GRANTING THE WRIT 8

I. THE FIFTH CIRCUIT'S SHARPLY DIVIDED *EN BANC* DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS AND SERIOUSLY DISTORTS FEDERAL COPYRIGHT LAW ON AN IMPORTANT ISSUE REQUIRING UNIFORMITY. 8

A. A Clear Conflict Exists. 8

TABLE OF CONTENTS — Continued

Page

B. The Fifth Circuit's *En Banc* Decision Misconstrued the Copyright Act. 12

II. THE IMPORTANCE OF STANDARDS-DRAFTING ORGANIZATIONS TO FEDERAL, STATE, AND LOCAL GOVERNMENTS MAKES IT ESSENTIAL TO PROTECT THE ORGANIZATIONS' FINANCIAL RIGHTS UNDER THE COPYRIGHT LAWS. 23

A. Standards-Drafting Organizations Provide a Vital Service to All Levels of Government and, Ultimately, to Consumers. 23

B. The Fifth Circuit's Decision Will Substantially Undermine the Financial Capacity of Standards-Setting Organizations to Provide Their Services. 27

C. The Issues Have Been Fully Explored And The Conflict Is Ripe For Review. 28

CONCLUSION 30

APPENDIX A: EN BANC OPINION 1a

APPENDIX B: PANEL OPINION 67a

APPENDIX C: DISTRICT COURT OPINION 102a

APPENDIX D: STATUTORY PROVISIONS 117a

TABLE OF AUTHORITIES

Page

Cases:

Banks v. *Manchester*,
128 U.S. 244 (1888) ..... *passim*

Building Officials & Code Administrators v. *Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ... 8, 9, 29

Campbell v. *Acuff-Rose Music, Inc.*,
510 U.S. 569 (1994) 19

CCC Information Services, Inc. v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), cert. denied, 516 U.S. 817 (1995) 8, 11, 12

County of Suffolk v. *First American Real Estate Solutions*, 261 F.3d 179 (2d Cir. 2001) 11, 17

Feltner v. *Columbia Pictures Television, Inc.*,
523 U.S. 340 (1998) 13

Fox Film Corp. v. *Doyal*,
286 U.S. 123 (1932) 13

Harper & Row Publishers, Inc. v. *Nation Enterprises*,
471 U.S. 539 (1985) 20

Mazer v. *Stein*,
347 U.S. 201 (1954) 13

TABLE OF AUTHORITIES — Continued

Page

Practice Management Info. Corp. v. *American Medical Ass'n*, 121 F.3d 516 (9th Cir.), cert. denied, 522 U.S. 933 (1997), opinion amended on other grounds, 133 F.3d 1140 (9th Cir. 1998) ..... *passim*

Sony Corp. of America v. *Universal City Studios, Inc.*, 464 U.S. 417 (1984) 12

Veeck v. *Southern Building Code Congress Int'l, Inc.*, 293 F.3d 791 (5th Cir. 2002) (*en banc*) 1, 6

Veeck v. *Southern Building Code Congress Int'l, Inc.*, 241 F.3d 398 (5th Cir. 2001) 1, 6

Veeck v. *Southern Building Code Congress Int'l, Inc.*, 49 F. Supp. 2d 885 (E.D. Tex. 1999) 1, 5

Wheaton v. *Peters*, 33 U.S. (8 Pet.) 591 (1834) 6, 9, 10

Constitution, Statutes, and Regulations:

U.S. CONST. art. I, § 8, cl. 8 12

17 U.S.C. § 101 1

17 U.S.C. § 105 ..... 1, 14

17 U.S.C. § 107 19

17 U.S.C. § 201(a) 13

TABLE OF AUTHORITIES — Continued

Page

17 U.S.C. § 201(e) 1, 13-14

28 U.S.C. § 1254 1

28 U.S.C. § 1331 1

28 U.S.C. § 1332 1

28 U.S.C. § 1338 1

29 U.S.C. § 652(8) 24

29 U.S.C. § 655(a) 24

29 U.S.C. § 666 24

National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 Note 1, 15

7 C.F.R. Pt. 1924, Subpt. A, Exh. I 25

7 C.F.R. § 1755.200 25

7 C.F.R. § 1755.500 27

16 C.F.R. § 1505.5(e)(5) 25

24 C.F.R. § 3280.607(c)(6)(iv) 25

29 C.F.R. § 1910.6 28

29 C.F.R. § 1910.6(a)(1) 24

TABLE OF AUTHORITIES — Continued

Page

29 C.F.R. § 1910.6(a)(4) 28

29 C.F.R. § 1910.6(d)(1) 26

29 C.F.R. § 1910.6(e)(30) 26

Fed. Cir. R. App. V, IOP 11(1) 23

Miscellaneous:

H.R. Rep. No. 1476, 94th Cong., 2d Sess. (1976) .. 14, 15, 22

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TABLE OF AUTHORITIES — Continued

Page

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NIMMER ON COPYRIGHT (2002) 12, 21, 29

OMB Circular No. A-119, 63 Fed. Reg. 8545 (revised 1998) 16, 24

L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719 (1989) 29

Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 173 (1998) 19

Alan S. Wernick, *Copyrights and Codes: Model Building Codes as Protectible Works Under the U.S. Copyright Laws*, CCH Guide to Computer Law, Issue No. 236 (June 1, 2001) 29

OPINIONS BELOW

The opinion of the district court granting SBCCI's motion for summary judgment and granting a permanent injunction and monetary damages (Pet. App. 102a) is reported at 49 F. Supp. 2d 885. The divided opinion (Pet. App. 67a) of the panel of the court of appeals affirming the judgment is reported at 241 F.3d 398. The divided opinion (Pet. App. 1a) of the *en banc* court reversing the judgment is reported at 293 F.3d 791.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1332, and 1338. The original judgment of the court of appeals affirming the district court's judgment was entered on February 5, 2001. A timely petition for rehearing *en banc* was granted on October 27, 2001. The judgment of the court of appeals *en banc* reversing and remanding with directions to dismiss SBCCI's claims was entered on June 7, 2002. This Court has jurisdiction to review the case under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Copyright Act, 17 U.S.C. §§ 101, 105 and 201(e), and the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 Note, are set forth in Pet. App. 117a-118a.

STATEMENT

1. ***SBCCI and other code-writing organizations.*** SBCCI is a not-for-profit organization whose primary purpose, since 1940, has been to create uniform "model codes" to guide the safe design, construction and operation of commercial and residential buildings. Its membership includes 2,500 cities, counties, states and governmental agencies as well as 14,000 architects, engineers, building contractors, trade associations, and manufacturers. SBCCI drafted and holds registered copyrights in the five codes at issue in this case: the Standard Building Code,

the Standard Gas Code, the Standard Plumbing Code, the Standard Mechanical Code, and the Standard Fire Prevention Code.

Code-writing entities like SBCCI make available standardized, expertly prepared, and regularly revised model codes to state and local governments across the country. Most municipalities, like the small communities involved in this case, lack the resources needed to prepare such complex codes themselves. The activities of organizations developing model codes and standards have burgeoned in the last two decades as more and more towns and cities decide that taking advantage of the work of organizations like SBCCI is the most cost-effective way to adopt sound technical requirements and keep them up to date. This approach also provides architects, engineers, contractors and manufacturers with uniform standards that do not vary materially from locale to locale.

Over the years, thousands of local governments have adopted some or all of SBCCI's model codes as part of their local building requirements. These carefully organized codes are lengthy and detailed, often running into several hundred pages of technical text, so virtually all governments simply incorporate them by reference rather than enact the full text itself in a local law or ordinance.

SBCCI, like most code-drafting organizations, finances a large part of its work through sales of its model codes to the professionals who utilize them. All the codes SBCCI publishes concern technical matters of immediate concern only to professionals and tradespeople in the building industry, including architects, engineers and builders. Since these are uniform or model codes, a single copy may suffice to inform the professional about the precise requirements applicable to doing business in a vast number of localities.

2. ***Widespread and easy availability of the codes.*** SBCCI permits municipalities to incorporate its codes into their laws

without charge. Those municipalities typically make copies of the codes available in their offices for public inspection. Copies can also be ordered easily through SBCCI's website or by telephone and are available on amazon.com and in many bookstores and libraries. Purchasing model codes from SBCCI's website (www.sbcci.org) is straightforward—and generally easier than reviewing the codes in the offices of the jurisdictions that have adopted them. SBCCI's home page features a left-border menu identifying its "Order & Price List," which produces a pop-up menu from which visitors can select the codes and edition of interest. A package of all five codes at issue in this case (Building, Plumbing, Fire Prevention, Gas, and Mechanical) costs $175 for members and $262.50 for nonmembers, and an automatic 5% discount is applied to all internet orders. (CD-ROM versions are slightly more expensive, because they contain additional material.) Checkout is simple and similar to major commercial websites.

Any person can apply for membership online. Annual membership dues are reasonable ($40 per year for a city with population below 5,000, such as the two towns involved in this case; $25 for students; $50 for individual professionals; and $150 for a company or manufacturer). Membership entitles the applicant to receive expert code interpretations by SBCCI engineers and to obtain significant discounts on the codes themselves. Members are given frequent updates and notices concerning the code-drafting process, a process open to the public in which anyone may submit proposed changes and participate in the debate regarding those changes. In addition, governmental units receive a complete set of SBCCI's codes free when they join, and individual professionals receive a free copy of one code of their choice. Even without these free copies, any interested person can acquire a complete set of the five lengthy and complex technical codes for less than $220. The five codes total 1,082 pages in length, so acquiring them through SBCCI costs about 20 cents per page, far less than the amount often charged for

photocopying statutes and cases in public libraries or municipal offices.

3. ***Veeck's infringement of SBCCI's copyrights.*** Respondent Peter Veeck controls and operates Regional Web, a website presenting information of interest in the area around Veeck's home town, Denison, Texas. Veeck decided to post the entire text of five of SBCCI's model codes on his website because they had been incorporated by reference into the building codes of two small, nearby Texas towns, Savoy and Anna. Veeck, who is retired, is not regulated by those codes. He does not live in Savoy or Anna, and he is not (and never was) involved in the building industry. Pet. App. 35a.

Veeck's efforts to obtain copies of SBCCI's codes began with two visits to the clerk's office in Anna. As is common in small, understaffed municipal offices (Anna's and Savoy's populations are both below 1,000), he found the clerk away or the office closed. When he visited Savoy, he was told that the codes were in the Public Works office, but chose not to pursue that information. According to Veeck's testimony, the codes were available in both Anna and Savoy. Indeed, he knew of no municipality in which the codes were not available for review and copying in town offices. Area libraries also held copies of the codes. But Veeck found the municipal services of these tiny towns inconvenient, so he decided to take advantage of the ready availability of the codes through SBCCI itself. For $385 he purchased copies of the lengthy codes on floppy disk via a telephone order. When he received them, he cut and pasted the entire text, the equivalent of some 1,082 printed pages of the copyrighted model codes, onto his website, but purposefully omitted all of SBCCI's copyright notices.

The fact that the model codes were copyrighted was evident to Veeck. The packaging in which the disks were shipped—which he had to rip through to get to the disks—bore prominent, standard copyright warnings. By opening and using the codes, Veeck agreed to the conditions of the licensing

agreement. By publishing the entire texts on his website he disregarded that agreement and infringed the copyrights.

4. *Decision below.* When SBCCI discovered that Veeck had violated its copyrights, it sent him a cease and desist letter. Veeck responded by filing suit in the United States District Court for the Eastern District of Texas, seeking a declaratory judgment that his actions were exempt from the dictates of copyright law. SBCCI counterclaimed for copyright infringement, breach of contract, and unfair competition.

The district court decided all issues in SBCCI's favor. See 49 F. Supp. 2d 885 (E.D. Tex. 1999), Pet. App. 102a. Recognizing that the model codes are copyrighted, Judge Folsom examined and rejected Veeck's arguments that adoption into law stripped the codes of their copyright protection. Addressing Veeck's argument that protecting SBCCI's copyright was a violation of the public's due process "right to access the law," the court found on the basis of undisputed evidence that the codes *were* readily available in the cities in which they had been adopted. Pet. App. 106a-109a.

The court then turned to Veeck's "merger" defense. Merger in copyright law is an outgrowth of the rule that only expression, not the facts or ideas that are expressed, may be copyrighted. Merger occurs when idea and expression coincide—principally, when there is only one way of expressing an idea, such as where the idea is a mathematical formula expressible only by stating that formula. Merger precludes copyright. The court found that there is nothing like merger in this case: there is no idea of which SBCCI's model codes are the unique expression because the requirements of building codes can be expressed in many different ways. Pet. App. 109a. The court dismissed Veeck's misuse, waiver and fair use defenses, sustained SBCCI's infringement claim, awarded statutory damages, and imposed a permanent injunction. Pet. App. 110a-115a.

Veeck appealed. A panel of the Fifth Circuit affirmed all aspects of the decision below. See 241 F.3d 398, Pet. App. 67a. The full court then granted rehearing *en banc*, and, in a deeply divided 9-to-6 decision, reversed. 293 F.3d 791 (*en banc*), Pet. App. 1a. The division within the court reflected the sharply varying submissions made by various governmental bodies and other standards-setting and code-drafting organizations as *amici curiae*. The majority's sweeping opinion rested on two grounds: first, that it is impossible to copyright "the law;" second, that draft codes merge with the law when adopted by a legislative body and thus are stripped of copyright protection.

Like the decisions by the district court and the panel, the majority opinion began with the unassailable proposition that "SBCCI indisputably holds a copyright in its model building codes." Pet. App. 4a. But then the majority rejected the holding of two other circuits and concluded that, once adopted, model codes and standards lose their copyright protection.

The majority interpreted *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591 (1834), and *Banks* v. *Manchester*, 128 U.S. 244 (1888), which held that judicial opinions are not copyrightable, as creating a staggeringly broad exception to the Copyright Act. According to the majority, *Banks* meant that there is a "due process" right of access to the law and that, even when there is easy access to "the law"—and there is, therefore, no constitutional problem with upholding copyright—"the law" simply cannot be copyrighted. Pet. App. 7a. Turning to merger, the majority announced, without citation or analysis, that "codes are 'facts' under copyright law," and "[i]t should be obvious that for copyright purposes, laws are 'facts.'" Pet. App. 17a-18a. Having assumed its conclusion, the court declared that the merger doctrine extinguished SBCCI's copyright. Pet. App. 19a-20a.

Six judges dissented. The first dissent, authored by Judge Higginbotham and joined by three others, concluded that the court should have respected the choice made by each municipality to

adopt copyrighted codes rather than to draft codes itself. The majority's holding meant "as a matter of federal common law[] that the choice made by the voters of this municipality was not available to it." Pet. App. 28a. Stressing that it is for Congress to decide whether to alter the Copyright Act to comport with changes in technology, Judge Higginbotham concluded: The majority's belief that it "should invalidate an otherwise valid copyright * * * comes with no constitutional or statutory text, except its reliance upon the merger doctrine, and that is wordplay." Pet. App. 31a.

Judge Wiener wrote the second dissent, joined by all six dissenting judges. He objected that the majority was taking a dramatic step away from copyright law without any truly apposite precedents from this Court and in a manner that conflicted with decisions in other circuits, with congressional pronouncements, and with federal agency actions. Pet. App. 37a-39a. The dissenters observed that SBCCI and other standards-setting organizations perform a valuable function and need sales revenues to continue their work and maintain their independence. The dissent emphasized that, in this case, there is no actual problem with "access to the law" and that, if a problem of restricted access were ever to arise, the copyright law's doctrines of fair use and implied license would be quite sufficient to assure reasonable access without holding that every model code automatically loses its copyright protection as soon as a municipality incorporates it. The dissenters concluded, therefore, that "as a matter of law, * * * despite being adopted into law, SBCCI's codes are not in the public domain." Pet. App. 52a.

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT'S SHARPLY DIVIDED *EN BANC* DECISION CONFLICTS WITH DECISIONS OF THE SECOND AND NINTH CIRCUITS AND SERIOUSLY DISTORTS FEDERAL COPYRIGHT LAW ON AN IMPORTANT ISSUE REQUIRING UNIFORMITY.

A. A Clear Conflict Exists.

The Fifth Circuit's decision holds that not-for-profit organizations that author copyrighted model codes and standards lose their copyright protection when a governmental body incorporates the model code by reference. By contrast, two other circuits have explicitly held that adoption into law of privately-written model standards does not destroy the private entity's copyright. *Practice Management Info. Corp.* v. *American Medical Ass'n*, 121 F.3d 516, 518 (9th Cir.), cert. denied, 522 U.S. 933 (1997), opinion amended on other grounds, 133 F.3d 1140 (9th Cir. 1998); *CCC Information Services, Inc.* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2d Cir. 1994), cert. denied, 516 U.S. 817 (1995). Most of the model codes drafted by organizations like the SBCCI have been adopted by local governments within several circuits. Thus, a particular model code will be either protected or unprotected depending solely on the circuit in which an unauthorized publisher sues for a declaration that his action is immune from the Copyright Act or the copyright holder sues to enforce its copyright. This result of the decision below creates chaos on an important issue of federal law, since the legal status of a particular code will turn on which side wins the race to a court house in a circuit with favorable law. This type of conflict presents a classic case for certiorari.

Moreover, the conflict is even broader than the Fifth Circuit itself acknowledged. The majority relied heavily on a statement in a First Circuit case, *Building Officials & Code Administrators* v. *Code Technology, Inc.*, 628 F.2d 730 (1st Cir. 1980) ("*BOCA*"), that copyright protection in these circumstances may be

inconsistent with the "public's essential due process right of free access to the law[,]including a necessary right freely to copy and circulate all or part of a given law." 628 F.2d at 736. But the Fifth Circuit placed more weight on *BOCA* than this assertion was intended to have.

The district court in *BOCA* had entered a preliminary injunction preventing the defendant from distributing its own copies of the Massachusetts building code, which was based largely on a copyrighted model code. The First Circuit vacated that preliminary relief but "stop[ped] short * * * of ruling definitely on the underlying legal issues, since we feel that our final judgment should await [a] more complete hearing on the merits." *Id.* at 732. This cautious ruling, made in 1980, was informed by the First Circuit's prescient observation that the question

> "may be of importance in view of a possible trend towards state and federal adoption, either by means of incorporation by reference or otherwise, of model codes. * * * Groups such as BOCA serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available." *Id.* at 736.

After noting that code-drafting organizations were coming to serve an increasingly "important public function," the First Circuit left open the possibility that the copyright exception recognized in the nineteenth century decisions in *Banks* and *Wheaton* (which held only that judicial opinions may not be copyrighted) should be adapted "to accommodate modern realities" of drafting technical codes. *Ibid.* After further litigation on remand, as BOCA noted in one of the several *amicus* briefs filed in the court below, the final order in the case recited that the defendant eventually "acknowledge[d] the validity of Plaintiff's [BOCA's] copyright in suit and infringement thereof by the publishing" of the code that was based on BOCA's copyrighted model code.

Decisions by other circuits since the First Circuit's decision in *BOCA* have refused to follow the statement on which the majority below relied and instead have concluded that modern copyright law secures to the authors of model codes the protection their creativity has earned. The model code considered by the Ninth Circuit in *Practice Management* was the American Medical Association's coding system for identifying medical procedures, the CPT. Congress had ordered the federal Health Care Financing Administration ("HCFA") to produce a uniform code for doctors to use in identifying procedures on Medicare and Medicaid claim forms. 121 F.3d at 517. The HCFA decided simply to adopt the CPT and promulgated regulations requiring the code to be used on Medicaid forms. *Id.* at 518. The plaintiff, a publisher of medical books, sought a declaratory judgment that "the CPT became uncopyrightable law when HCFA adopted the regulation mandating use of CPT code numbers in applications for Medicaid reimbursement." *Ibid.* The district court granted summary judgment for the American Medical Association and the Ninth Circuit affirmed.

The plaintiff's argument there, like Veeck's, rested primarily on *Banks,* in which this Court held, drawing on *Wheaton*, that a state supreme court's opinions cannot be copyrighted. The Ninth Circuit identified two grounds for that decision. First, as the work of public officials paid by the public, judicial opinions are always in the public domain. *Ibid.* The court observed that, while judges who are paid a salary to write opinions do not need financial incentives to do so, private entities that write codes later adopted into law need the financial incentives provided by copyright law in order to create their works. *Ibid.* Stripping private code-writing bodies of their copyright protection would seriously damage the industry:

> "As the AMA points out, invalidating its copyright on the ground that the CPT entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference

works to invalidation. Non-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency." *Id.* at 518–519.

The second rationale of *Banks* was "the due process requirement of free access to the law." *Id.* at 519. But, just as in this case, there was no evidence that copyright protection impeded access. *Ibid.* Even if such a problem arose, the court reasoned that it would be better dealt with from within copyright law, through the doctrines of fair use and mandatory licensing, or "due process defenses" for infringers, rather than by stripping the codes of copyright protection. *Ibid.* Rejecting the plaintiff's merger argument, *id.* at 520 n. 8, the Ninth Circuit held that incorporation into law did not extinguish the AMA's copyright.

The Second Circuit's decision in *CCC Information Services* reached the same result. The copyright holder published a book of used car valuations, the *Red Book*. Another entity, CCC Information Services, loaded large portions of the *Red Book* onto its computer network and republished it to consumers in various forms, including averaging *Red Book* prices with those of a competitor, the *Bluebook*. *CCC Information Services, Inc.*, 44 F.3d at 63–64. These *Red Book / Bluebook* average valuations were adopted in several state statutes as a standard for insurance payments upon the total loss of a vehicle. *Id.* at 64. CCC argued that "the *Red Book* has come into the public domain as the result of its adoption in state statutes regulating the amount of insurance payments," *ibid.*, and that the *Red Book* was unprotected by copyright because it fell under the "merger" rule, *id.* at 68.

The Second Circuit rejected both arguments. In its discussion of CCC's public-domain argument, the court refused "to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright." *Id.* at 74; see also *County of Suffolk* v. *First American Real Estate Solutions*, 261 F.3d 179, 193–195 (2d Cir. 2001) (rejecting related "public

domain" argument). The court noted that the opposite rule would nullify the copyrights of any books designated as required reading by state or local educational authorities, because students would not be able to comply with the law without accessing material under the private control of its copyright owners. The court also observed that the leading treatise, NIMMER ON COPYRIGHT, agreed that adopted codes should not lose their copyright protection. Finally, the court was concerned that a contrary holding would violate the Takings Clause. *CCC Information Services, Inc.*, 44 F.3d at 74.

Thus, there is a square conflict among the circuits on the question whether not-for-profit organizations lose their copyrights once a governmental entity requires that the provisions of their model codes and standards be followed.[1]

B. The Fifth Circuit's *En Banc* Decision Misconstrued the Copyright Act.

1. The Copyright Act reflects a well established and fundamental constitutional policy. Congress is empowered to make laws "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." U.S. CONST. art. I, § 8, cl. 8. From the earliest days of the Republic, Congress has protected the rights of copyright holders. *Sony Corp. of America* v. *Universal City Studios, Inc.*, 464 U.S. 417, 460 (1984) ("This Nation's initial copyright statute was passed by the First Congress"). Indeed, "statutory copyright protections were

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[1] The majority attempted to deny that its decision created a conflict, invoking a fanciful distinction between model "codes" and model "standards." It takes little reflection to appreciate, however, that neither in principle nor in practice does the label attached to an organization's proposals make any difference under the Copyright Act or the due process clause. Once a government entity adopts an organization's copyrighted proposals and requires compliance with them, their legal and practical status is the same.

enacted even before adoption of the Constitution. In 1783, the Continental Congress passed a resolution recommending that the States secure copyright protections for authors." *Feltner* v. *Columbia Pictures Television, Inc.*, 523 U.S. 340, 350 (1998).

The key purpose of the copyright law is to create incentives to produce work valuable to the public generally. "A copyright, like a patent, is 'at once the equivalent given by the public for benefits bestowed by the * * * skill of individuals, and the incentive to further efforts for the same important objects.'" *Fox Film Corp.* v. *Doyal*, 286 U.S. 123, 127–128 (1932). "The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in 'Science and useful Arts.'" *Mazer* v. *Stein*, 347 U.S. 201, 219 (1954).

The plain language of the Copyright Act guarantees that copyrighted model codes and standards retain their protected status even when adopted and incorporated as legal requirements. A copyright in a work "vests initially in the author or authors of the work." 17 U.S.C. § 201(a). Every opinion filed in this case has acknowledged that SBCCI acquired valid copyrights in its model codes when it created the works.

The *en banc* majority, however, held that those copyrights were divested once a local government acted to adopt the model codes and incorporated them by reference as requirements to be observed. This holding, however, flies in the face of the plain language of the Copyright Act. Crucially, Congress has declared that copyrights may not be divested from their owners, even by the actions of government:

> "**Involuntary Transfer.**—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, *no action by any*

> *governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership* with respect to the copyright, or any of the exclusive rights under a copyright, *shall be given effect* under this title, except as provided under title 11 [regarding bankruptcy]." 17 U.S.C. § 201(e) (emphasis added).

As reflected in the unambiguous terms of the statute, the "purpose of this subsection is to reaffirm the basic principle that the United States copyright of an individual author shall be secured to that author, and cannot be taken away by any involuntary transfer." H.R. Rep. No. 1476, 94th Cong., 2d Sess. 173 (1976). This statutory protection has been understood as protecting the creators of model codes such as SBCCI's:

> "If, for example, a building code is written by a private author and is otherwise sufficiently original and expressive to qualify for copyright protection, then those facts do not change because of any action by a legislative body. Indeed, the text of the Copyright Act [in § 201(e)] itself prohibits such a change in copyright status, and arguably prohibits any action by a legislative body that would invalidate a copyright even with due process and just compensation." Trotter Hardy, *The Copyrightability of New Works of Authorship: "XML Schemas" as an Example*, 38 Hous. L. Rev. 855, 878 (2001).

SBCCI has never voluntarily transferred any of its copyrights in its codes. It encourages governments to *adopt* its codes, but always explicitly reserves its copyrights. Section 201(e) declares that the actions of governments in adopting SBCCI's codes *cannot* terminate or expropriate SBCCI's copyrights, yet that is precisely the effect the Fifth Circuit attributed to the actions of localities in adopting SBCCI's codes.

2. Congress and the executive branch have implemented these statutory policies by assuring that the federal government's use or incorporation of copyrighted model codes and standards will not jeopardize the copyrights. For example, 17 U.S.C. § 105

provides that copyright protection "is not available for any work of the United States Government." A savings clause had been proposed "to make clear that the copyright protection of a private work is not affected if the work is published by the Government," but this assurance was considered superfluous, because the definition of "work of the United States Government" excluded privately authored works. H.R. Rep. No. 1476, 94th Cong., 2d Sess. 60 (1976). The committee observed that "publication *or other use* by the Government of a private work would not affect its copyright protection in any way." *Ibid.* (emphasis added). As the Solicitor General has advised the Court, this language means: "Nothing in the Copyright Act * * * would permit a termination of copyright protection" in the circumstances of the *Practice Management* case, *supra*, in which a federal agency, in lieu of creating and promulgating its own billing codes, had required Medicaid participants to use the AMA's copyrighted system of codes. See Brief of United States as *Amicus Curiae* in *Practice Management Info. Corp.* v. *American Medical Ass'n*, No. 97-1254, at 7 & n.9 (Aug. 1998).

The congressional policy flouted by the *en banc* majority in this case also has found expression in the National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 Note. In that Act, Congress commanded that federal agencies take advantage of the work of standards-setting organizations wherever possible. All federal agencies and departments "shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities," unless "inconsistent with applicable law or otherwise impractical."

Pursuant to the Act, the Office of Management and Budget issued instructions on the use of privately-developed, consensus-based standards, explaining that such model codes and standards

"a. Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation.

"b. Provide incentives and opportunities to establish standards that serve national needs.

"c. Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization of standards.

"d. Further the policy of reliance upon the private sector to supply Government needs for goods and services." OMB Circular No. A-119, 63 Fed. Reg. 8545, 8554-55 (revised 1998), *available at* http://www.whitehouse.gov/omb/circulars/a119/a119.html.

The OMB recognized, however, that the only way to effectuate Congress's desire to have federal agencies rely so extensively on the work of standards-setting organizations was to protect the copyrights of those organizations. Accordingly, OMB directed: "If a voluntary standard is used and published in an agency document, ***your agency must observe and protect the rights of the copyright holder and any other similar obligations***." *Ibid.* (emphasis added). The Fifth Circuit's ruling thwarts that congressional purpose as OMB recognized it.

3. Despite these unambiguous provisions of federal law, the *en banc* majority invented an exception to the copyright owned by drafters of model codes, holding that adoption into law throws the codes into the public domain. Short of a constitutional violation, the court needed at least a statutory hook in the Copyright Act on which to hang such an exception. It had none. Instead it relied on a contorted interpretation of this Court's 1888 decision in *Banks*, which involved the question whether opinions of a state supreme court may be copyrighted. The Court there had concluded:

"Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can

> themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors * * * and there has always been a judicial *consensus*, from the time of the decision in the case of *Wheaton* v. *Peters*, 8 Pet. 591, that no copyright could under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or a statute." 128 U.S at 253.

Unlike the majority below, the Second and Ninth Circuits correctly concluded that *Banks* rests upon two principles, neither of which justifies abrogating a standards-setting body's copyright. See *First American Real Estate Solutions*, 261 F.3d at 194; *Practice Management Info. Corp.*, 121 F.3d at 518. First, the passage makes clear that the product of *public employees* performing government work belongs to the people: "[T]he public owns the opinions because it pays the judges' salaries." *Practice Management Info. Corp.*, 121 F.3d at 518; see *First American Real Estate Solutions*, 261 F.3d at 193. Second, the constitutional "due process requirement of free access to the law" may prevent government officials from claiming "copyright" ownership that restricts dissemination of information about the terms of "the law" they create. 121 F.3d at 519; 261 F.3d at 193–94. As the other circuits have recognized, however, neither principle in *Banks* (or in any other decision of this Court construing the copyright law) applies to *privately* created model codes that *were validly copyrighted when first created and published* and that *remain easily accessible* after they are incorporated by local governments.

SBCCI's "indisputably" valid copyrights are congressionally-created rights; derogation from those rights can only be grounded in the Copyright Act itself, or in the Constitution. What the

Solicitor General said in his *amicus* brief in *Practice Management Info. Corp.* v. *American Medical Ass'n*, supra, at 7, applies equally here: "This case * * * concerns the termination of copyright protection for a work that was concededly entitled to such protection at the time it was written. Nothing in the Copyright Act—either at the time of *Banks* or at present—would permit a termination of copyright protection in these circumstances."

As the dissent below pointed out, metaphorical references to "free accessibility to the law" do not change this conclusion. The district court found on the basis of uncontroverted evidence that SBCCI's model codes were easily accessible to anyone who needed to consult these specialized technical materials. Indeed, they were more accessible through their creator, SBCCI, than they were through the small hamlets that chose to incorporate them by reference.

Moreover, the fact that Veeck and any other potential user of the model codes must pay a fee to obtain a copy of the full text of the copyrighted material does not create a genuine constitutional issue. "Free accessibility" of the law does not necessarily mean unlimited copying for free. Veeck did not want mere *access* to the building codes of the two towns. He could have consulted them at town offices, if he had simply followed the town's procedures. Instead, he wanted *copies* of the full text of over a thousand pages of model code provisions. At no time in our history has government at any level perceived a constitutional obligation to supply to every citizen a *personal copy* of the text of every form of law, statutory and judicial, *for free*.

Although some courts and legislatures now make some "law" available for free on the internet, this is a very recent innovation and it is hardly universal. As a practical matter, throughout our history, even the non-copyrighted portions of statutes and judicial decisions have been available only to lawyers, law schools, and libraries willing to pay the commercial publishers such as West

Publishing who actually print and distribute the text of statutes and opinions. For over a century, paying West Publishing was the only convenient way to access most case law and statutes. It was the norm to pay a reasonable fee to avoid time-consuming trips to a court house or a legislative clerk's office. See Deborah Tussey, *Owning the Law: Intellectual Property Rights in Primary Law*, 9 Fordham Intell. Prop. Media & Ent. L.J. 173, 178 (1998) ("Commercial publishers have always been the major purveyors of legal information in this country * * * [and] are the only sources of legal information in many markets."). Indeed, even today, anyone wishing to obtain a personal copy of the U.S. Reports or the United States Code or to subscribe to this Court's slip opinions must pay the Government Printing Office for "the law," even though the content itself is not copyrighted.

Thus, there is hardly a conflict with the "due process" right to know what the law is, if the creators of model codes, like any other copyrighted material, continue to enjoy copyright protection even after a locality incorporates that material by reference into local law. Due process does not require that every citizen be given a free book of every law that might be of interest, even when—unlike this case—the citizen is directly bound by the law.

4. As the dissenters below also noted, copyright law has ample safety valves for dealing with the hypothetical concern that some owner of some model code or standard might refuse to make a copy of the materials accessible on a reasonable basis. One protection that obviates the justification for nullifying the copyright is the doctrine of "fair use." See *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 575 (1994).

The fair use doctrine is codified at 17 U.S.C. § 107. It provides that "[i]n determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3)

the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work." The fourth factor, market effect, is "undoubtedly the single most important element of fair use." *Harper & Row Publishers, Inc.* v. *Nation Enterprises*, 471 U.S. 539, 566 (1985).

The fair use doctrine permits free copying for personal use of selected portions of a copyrighted work. SBCCI has always acknowledged that people may copy particular code sections for their own use from codes kept in municipal offices or libraries. Such copying is a fair use because the relation of the part copied to the code as a whole is small. In addition, limited copying of excerpts would have little effect on the market for sale of model codes. That market is composed primarily of construction professionals and manufacturers, who need the entire codes. The market is not individual consumers, who have only a secondary interest in these specifications. In this case, however, Veeck copied five of SBCCI's codes in their *entirety* and *published* them online, thus making the full text available for free to the entire world—including in circuits that would respect SBCCI's copyrights. That kind of indiscriminate distribution strikes directly at the heart of the financial protection a copyright owner is to enjoy. By no stretch could this be considered a fair use.

The principal commentator on the law of copyright, Professor Nimmer, has addressed the issue of constitutional accessibility of the law. He has suggested another protection that avoids the draconian approach taken by the majority below. In the highly unlikely scenario of a hypothetical standards-drafting organization that refuses to make the text of the incorporated standards available on reasonable terms to those who may have to comply with them, Nimmer insists that the underlying copyright protection should stand. The appropriate remedy for any person denied access to the law but charged with failing to comply with it is to invoke that denial as a defense:

> "[F]ailure to observe those due process notice requirements could readily constitute a defense for one charged with violation of the non-publicized law. It might well also justify, and perhaps require, the recognition of a fair use defense by one who reproduced such a copyrighted code for his own personal use. It may be doubted, however, whether it should also immunize from copyright liability a competitive commercial publisher, as in *Building Officials* [*BOCA*], at least where the copyright owner of the code, or its licensee, has published and adequately disseminated authorized copies of the code. To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes." 1 NIMMER ON COPYRIGHT § 5.06[C], at 5–94 (2002).

Whichever way this hypothetical constitutional concern is allayed, the concern has no bearing here. According to Veeck's own testimony, the SBCCI codes were available in municipal offices in every town in which he inquired; and they were readily available directly from SBCCI. See Brief of United States as *Amicus Curiae* in *Practice Management Info. Corp.* v. *American Medical Ass'n*, supra, at 8 (commenting that "[t]here is no suggestion in this case * * * that the AMA's copyright on the CPT has interfered with reasonable access to the requirements of the law," where the AMA sold its code for $40 to $50 per copy).

5. The *en banc* majority fundamentally misunderstood the important but limited doctrine of "merger." Copyright protection is not available under the merger doctrine if an otherwise copyrightable expression is so intertwined with an uncopyrightable idea or fact that granting copyright protection to the expression would restrain the dissemination of the idea or fact. The court below made only conclusory assertions that "the law" is "a fact." But the "law" is no more a fact than, for example, a published book is a fact. Suppose that instead of arguing that

SBCCI's model codes "merged" with the "fact" of the law upon enactment, Veeck argued that Irvine Welsh's final draft of *Trainspotting* merged with the fact of being the novel *Trainspotting* upon publication. True, that is the unique expression of the book *Trainspotting*. No responsible observer, however, would think that the impossibility of conveying *this* novel in any way other than through the exact text of the novel nullified Welsh's copyright. The relevant point is that the novel is a unique expression of something particular. Others are free, however, to address the same subject in their own ways.

But that is precisely the flaw in what the majority did with SBCCI's codes. They are "facts" in the sense that they have real existence—as published materials. But there are countless ways to draft and express, for example, appropriate standards for the load that a floor in a six story commercial building should be able to support or the temperature that insulation material should be able to withstand before catching fire. These seemingly mundane matters are no less entitled to copyright protection than are artistic works, once the drafters of model codes have decided what they want to express and have expressed it. See H.R. Rep. No. 1476, 94th Cong., 2d Sess. 51 (1976) (the court-developed standard for "originality" in copyright relates to the formulation of the expression and "does not include requirements of novelty, ingenuity, or esthetic merit, and there is no intention to enlarge the standard of copyright protection to require them").

As the Second and Ninth Circuits have recognized, the situation is no different simply because localities have required affected persons to consult and use model codes like SBCCI's. Novels and history treatises, for instance, do not lose their copyright protection when a state education department promulgates a syllabus requiring students to read and be tested on those works, even if they have to buy the copyrighted books. Similarly, copyright protection for the venerable—and copyrighted—*Bluebook* is not forfeited simply because various courts require that lawyers who want to file briefs must comply

with the *Bluebook*'s style and format requirements. See, *e.g.*, Fed. Cir. R. App. V, IOP 11(1). A governmental requirement that one use copyrighted material does not strip the referenced work of its copyrighted status.

II. THE IMPORTANCE OF STANDARDS-DRAFTING ORGANIZATIONS TO FEDERAL, STATE, AND LOCAL GOVERNMENTS MAKES IT ESSENTIAL TO PROTECT THE ORGANIZATIONS' FINANCIAL RIGHTS UNDER THE COPYRIGHT LAWS.

A. Standards-Drafting Organizations Provide a Vital Service to All Levels of Government and, Ultimately, to Consumers.

1. For almost a century, not-for-profit standards-setting bodies have enabled governments across the country to adopt up-to-date, technically sound codes. A study conducted by the FTC's Bureau of Economics found that by 1981, 97% of U.S. cities had adopted model building codes, up from 47% in 1964. Staff Report, Bureau of Economics, Federal Trade Commission, *Local Building Codes and the Use of Cost-Saving Methods* 11, 16 (1988) ("FTC Bureau of Economics Report"). SBCCI's codes alone have been adopted in more than 2,500 jurisdictions throughout the United States. The Fifth Circuit's ruling would devastate the operations of drafters not only of model building codes, but those of myriad other standards-setting entities. This concern is evidenced by the filing of *amicus* briefs in the court of appeals by, to name a few, the American Medical Association, the American National Standards Institute (which has accredited 269 standards developers), the National Fire Protection Association, and Underwriters Laboratories.

Model building codes are more likely than locally-drafted codes to approximate the economically-optimal level of regulation. As the FTC Bureau of Economics found, the earlier practice of developing codes locally gave "more weight * * * to local interests;" those locally-created codes were "less frequently

revised to keep up with new technological developments;" they operated to "force builders to use different techniques in different localities;" and as a result this system "led to substantial increases in house prices" when compared with construction governed by model codes. FTC Bureau of Economics Report, *supra*, at 9–11.

By contrast, use of model codes minimizes duplication of effort by local government units and permits standardization that fosters savings industry-wide. These benefits extend from architects and builders, who can buy one code and use it everywhere they work, to manufacturers and hardware stores, which need to make or stock just one type of (for example) plumbing pipe. Eventually, as the FTC found, consumers benefit from the efficiency of these technologically sound and uniform standards, in the form of lower prices.

As discussed above, Congress has expressly directed all federal agencies to incorporate model codes and standards whenever possible in order to avoid unnecessary costs to the taxpayers, to assure technical competence, and to promote uniformity. As also cited above, OMB requires that federal agencies respect the drafters' copyrights when they decide to adopt proposed codes and standards.

Through this process, hundreds of copyrighted sets of standards developed by not-for-profit organizations have become federal requirements. Agencies as diverse as OSHA, the FDA, and the EPA incorporate these requirements by reference. Congress has directed that, once an agency has decided to incorporate standards proposed by a national standards-drafting organization, they have the same legal force as those developed by the agencies themselves. See, *e.g.*, 29 U.S.C. §§ 652(8), 655(a), 666; 29 C.F.R. § 1910.6(a)(1) (OSHA). *Amicus* briefs filed below compiled a list of over 800 different provisions of the C.F.R. that refer to or adopt the standards of just one of these organizations, the American Society for Testing and Materials. The C.F.R.

contains over 200 references to National Fire Protection Association standards.

As recently as July 31, 2002, the Defense Department adopted Unified Facilities Criteria incorporating by reference the International Building Code developed jointly by SBCCI and two other not-for-profit standards-drafting organizations. See Department of Defense, Unified Facilities Criteria: Design: General Building Requirements (July 31, 2002), *available at* http://www.lantdiv.navfac.navy.mil/pls/lantdiv/docs/FOLDER/EICO/UNIFIED_FACILITIES_CRITERIA/UFC+1-200-01.PDF. The Code will govern all DoD construction projects, including the work of the architects and contractors who participate in these projects. The decision to take advantage of the creative effort devoted to the project by SBCCI and its sister organizations and to incorporate the extensive technical requirements by reference will promote efficiency, uniformity and reliability while saving taxpayers millions of dollars.

Another illustration of the prevalence and importance of model codes is the National Electrical Code ("NEC") prepared by the National Fire Protection Association. It has been adopted in all fifty states, Puerto Rico, Guam, and by the federal government. It has been put to wide-ranging uses by federal agencies. See, *e.g.*, 7 C.F.R. § 1755.200 (incorporating NEC by reference into Rural Utilities Service standard for splicing copper and fiber optic cables); 7 C.F.R. Pt. 1924, Subpt. A, Exh. I (requiring that NEC be complied with in construction of seasonal farm labor housing); 16 C.F.R. § 1505.5(e)(5) & n.1 (adopting NEC by reference to define the type of electrical cord required in Consumer Product Safety Commission rule for electrical design and construction of articles intended for use by children); 24 C.F.R. § 3280.607(c)(6)(iv) (incorporating section of NEC as the standard for installing electrical components in a whirlpool bathtub).

There is no practical way the various federal, state, and local agencies could have developed these standards on their own

without spending enormous amounts of time and money. The breadth of membership in standards-drafting organizations shows why governments confidently rely on the work product created by these organizations. At SBCCI, for example, 2,500 of its 16,500 members are city, county, and state governments and agencies. Those government entities are designated "active members" and exercise substantial control over SBCCI's operations. They elect the members of the committees that run SBCCI's code-drafting operations. Most of SBCCI's active members are (or are agencies of) municipalities with populations of less than 10,000. Proposed changes to the codes are opened to notice and comment from the general public and voted on by the active members to assure that they are sound, fair, and practical.

2. The availability of these standards—to the government agencies and to the actual professional users—depends in substantial measure on the revenue that standards-drafting organizations derive from selling the copyrighted codes to commercial users. Federal, state and local governments have respected this cost-allocation system. They expect the commercial users of the copyrighted materials to underwrite a substantial part of the cost of creating the materials—by purchasing them from the organizations that create them.

All the codes at issue in this case—indeed, the vast majority of codes developed by the organizations that will be affected by the Fifth Circuit's rule—are highly technical and of direct relevance only to professionals and manufacturers in the pertinent industries. Unlike laws of general applicability, such as a state criminal code, the ordinary citizen has little need (or desire) to know, for example, about the content of the Agriculture Ammonia Institute–Rubber Manufacturers Association's Specifications for Anhydrous Ammonia Hose, adopted by reference in 29 C.F.R. § 1910.6(d)(1), or the American National Standards Institute's Compressed Gas Cylinder Valve Outlet and Inlet Connections Code, incorporated in 29 C.F.R. § 1910.6(e)(30).

Under the system now thrown into chaos by the Fifth Circuit, copyright protection for model codes and standards has meant that the costs of code drafting and revision have been borne largely by the regulated parties. They are the only ones generally interested in acquiring copies of the complete codes. This system is much more efficient than forcing all taxpayers to finance the service or laying the entire financial burden on the shoulders of the members of these not-for-profit organizations.

B. The Fifth Circuit's Decision Will Substantially Undermine the Financial Capacity of Standards-Setting Organizations to Provide Their Services.

The record contains ample evidence that loss of copyright protection will jeopardize the ability of standards-setting bodies to finance the drafting and updating of these codes. Affidavits from senior executives of SBCCI and its peer entities, the Building Officials & Code Administrators and the International Conference of Building Officials, established that they cannot function without the revenues derived from sales of their copyrighted codes. Such sales represent approximately half of SBCCI's total annual revenue. The National Fire Protection Association relies on sales of its codes for three quarters of its annual revenue. Many other similar organizations participated as *amici curiae* in the court below because they share the same concern about the destructive impact of the legal rule endorsed by the Fifth Circuit.

Recognizing what the majority of the Fifth Circuit cavalierly dismissed, federal agencies have taken pains to protect the financial interest of standards-drafting organizations in maintaining the revenue stream necessary to support their activities. See, *e.g.*, 7 C.F.R. § 1755.500 (stating that National Electrical Code is a trademark of the NFPA, and that copies are available for purchase from the NFPA, or for inspection during normal business hours at the U.S. Department of Agriculture, and at the Office of the Federal Register). The same approach is taken

in 29 C.F.R. § 1910.6, which lists the 181 standards developed by 17 private standards-setting organizations that have been adopted by reference by OSHA. *Id.* at § 1910.6(a)(4) (explaining that copies of each may be purchased by contacting the appropriate private standards organization at the addresses given, or inspected at the Office of the Federal Register or in OSHA offices).

These federally-adopted codes are made available in just the same way as the codes in this case were. They are available for *purchase* from the standards-setting organization or available for *review* in the offices of the adopting body. They are not published in full text in the Federal Register because they are lengthy and technical *and because they are copyrighted and the drafters retain their copyrights even after adoption.*

The Fifth Circuit, however, has rejected this sensible federal approach to reconciling the public's right of access to regulatory requirements and the standards-setting organizations' right to copyright protection. In doing so, the Fifth Circuit stripped the organizations of their copyright revenue. Even if the organizations can survive that loss of revenue, they will either have to cut back drastically on their operations or rely heavily on their membership for financing—a reliance that could threaten their independence or objectivity. Either consequence will undermine governmental protection of public health and safety. Indeed, as one major business magazine has commented about this case, "Veeck is challenging a basic feature of the modern regulatory state." Daniel Fischer, "We Own That Law," *Forbes*, Apr. 30, 2001, at 60.

C. The Issues Have Been Fully Explored And The Conflict Is Ripe For Review.

The Court has before it extensive opinions of the Fifth Circuit *en banc* plus the earlier analyses of three other circuits. The conflict on these important issues has evolved over twenty years and is fully matured.

Moreover, the questions presented have been discussed extensively in treatises and academic literature. See, *e.g.*, 1 NIMMER ON COPYRIGHT § 5.06[C], at 5–91 to 5–94 (2002) (discussing *BOCA* and the present case and suggesting that model codes should retain their copyright protection after adoption into law, lest the increasing trend in favor of use of such codes be stymied); Hardy, *supra*, 38 Hous. L. Rev. at 876–879 (2001) (discussing copyrightability of enacted model codes as a takings issue, with reference to both *BOCA* and this case); L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 UCLA L. Rev. 719, 748–749 (1989) (endorsing *BOCA*); Alan S. Wernick, *Copyrights and Codes: Model Building Codes as Protectible Works Under the U.S. Copyright Laws*, CCH Guide to Computer Law, Issue No. 236 (June 1, 2001) (arguing that incorporation into law does not nullify copyright in model codes); Robert Kry, Case Note, *The Copyright Law*, 111 Yale L.J. 761 (2001) (critiquing panel decision in this case).

Since the issues in this case have been subjected to extensive examination both by dozens of judges and many academics, the issues are ripe for review by this Court. Review is necessary to establish uniformity on questions of federal law of vital interest to hundreds of not-for-profit organizations involved in developing model codes and standards as well as to the thousands of government agencies that depend on their work.

CONCLUSION

The Court should grant this petition for a writ of certiorari and reverse the judgment below.

Respectfully submitted.

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SEPTEMBER 2002

APPENDIX

APPENDIX A
EN BANC OPINION

United States Court of Appeals,
Fifth Circuit.

Peter VEECK, d/b/a RegionalWeb,
Plaintiff-Counter Defendant-Appellant,

v.

SOUTHERN BUILDING CODE
CONGRESS INTERNATIONAL, INC.,
Defendant-Counter Claimant-Appellee.

No. 99-40632.
June 7, 2002.

Appeals from the United States District Court for the Eastern District of Texas.

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALE, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, PARKER, DENNIS and CLEMENT, Circuit Judges.

EDITH H. JONES, Circuit Judge:

The issue in this *en banc* case is the extent to which a private organization may assert copyright protection for its model codes, after the models have been adopted by a legislative body and become "the law". Specifically, may a code-writing organization prevent a website operator from posting the text of a model code where the code is identified simply as the building code of a city that enacted the model code as law? Our short answer is that as *law*, the model codes enter the public domain and are not subject to the copyright holder's exclusive prerogatives. As model codes, however, the organization's works retain their protected status.

BACKGROUND[1]

Peter Veeck individually operates "RegionalWeb" (<http://regionalweb.texoma.net>), a non-commercial website that provides information about north Texas. Sometime in 1997, Veeck decided to post on RegionalWeb the local building codes of Anna and Savoy, two small towns in north Texas that had adopted the 1994 edition of the Standard Building Code written by appellee, Southern Building Code Congress International, Inc. ("SBCCI"). Veeck made a few attempts to inspect several towns' copies of the Building Code, but he was not able to locate them easily. Eventually, Veeck purchased the 1994 model building codes directly from SBCCI; he paid $72.00 and received a copy of the codes on disk. Although the software licensing agreement and copyright notice indicated that the codes could not be copied and distributed, Veeck cut and pasted their text onto his RegionalWeb. Veeck's website did not specify that the codes were written by SBCCI. Instead, he identified them, correctly, as the building codes of Anna and Savoy, Texas.

The author of the codes, SBCCI, is a non-profit organization consisting of approximately 14,500 members from government bodies, the construction industry, business and trade associations, students, and colleges and universities. Since 1940, SBCCI's primary mission has been to develop, promote, and promulgate model building codes, such as the Standard Plumbing Code, the Standard Gas Code, the Standard Fire Prevention Code, and the Standard Mechanical Code. SBCCI encourages local government entities to enact its codes into law by reference, without cost to the governmental entity. No licensing agreements are executed in connection with legislative adoption, nor does SBCCI keep track of the entities that have

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[1] The facts stated here are undisputed.

adopted its codes. Although SBCCI is a non-profit organization, its annual budget, exceeding $9 million, derives in part from sales of its model codes and is used to fund continuing activities. There are no restrictions or requirements on membership in SBCCI, but non-members are charged considerably more for copies of its codes than are members.

While SBCCI continues to assert its copyright prerogatives — exclusively to publish the codes and license their reproduction and distribution — even as to codes that have been adopted by local entities, the organization insists that it grants liberal permission for copying. To support this contention, SBCCI offered in evidence several dozen letters of permission written to entities as diverse as book publishers, seminar providers, and municipal inspection agencies. Notably, each permit letter carefully circumscribed the amount of copying allowed.

SBCCI's generosity did not extend to Veeck's public-service posting of the Anna and Savoy building codes on his website. The organization demanded that he cease and desist from infringing its copyrights. Veeck filed a declaratory judgment action seeking a ruling that he did not violate the Copyright Act. SBCCI counterclaimed for copyright infringement, unfair competition and breach of contract. Both parties moved for summary judgment on the copyright infringement issue.

Finding no genuinely disputed material facts, the district court granted summary judgment in favor of SBCCI, including a permanent injunction and monetary damages. On appeal, a divided panel of this court upheld SBCCI's copyrights in the municipal building codes posted by Veeck, and it rejected his defenses to infringement based on due process, merger, fair use, copyright misuse and waiver.

We elected to rehear this case *en banc* because of the novelty and importance of the issues it presents.

DISCUSSION[2]

As the organizational author of original works, SBCCI indisputably holds a copyright in its model building codes. See 17 U.S.C. § 102(a). Copyright law permits an author exclusively to make or condone derivative works and to regulate the copying and distribution of both the original and derivative works. 17 U.S.C. § 106. The question before us is whether Peter Veeck infringed SBCCI's copyright on its model codes when he posted them only as what they became — building codes of Anna and Savoy, Texas — on his regional website. Put otherwise, does SBCCI retain the right wholly to exclude others from copying the model codes after and only to the extent to which they are adopted as "the law" of various jurisdictions?

The answer to this narrow issue seems compelled by three sources: the Supreme Court's holding that "the law" is not copyrightable; alternatively, the Copyright Act's exclusion from its scope of "ideas" or "facts"; and the balance of caselaw.

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[2] We review the district court's grant of summary judgment *de novo*. *Morris* v. *Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir. 1998); Fed. R. Civ. P. 56(c). At the summary judgment stage, a court may not weigh the evidence or evaluate the credibility of witnesses, and all justifiable inferences will be made in the nonmoving party's favor. *Id.* (citing *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986)). The district court drew some inferences from the facts, however, regarding the impact of copyrightability on SBCCI's operations that, if material, should not have been decided without a trial. We find it unnecessary to reach those issues.

I. The Supreme Court's View

Excluding "the law" from the purview of the copyright statutes dates back to this nation's earliest period. In 1834, the Supreme Court interpreted the first federal copyright laws and unanimously held that "no reporter has or can have any copyright in the written opinions delivered by this Court ..." *Wheaton* v. *Peters*, 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834). The case arose when one of the Court's official reporters was asserting copyright protection for his annotated compilations of Supreme Court opinions. The Court distinguished between the reporter's individual work and the Justices' opinions. The Court's rejection of copyright for judicial opinions paralleled the principle — recognized by attorneys for both parties — that "[s]tatutes were never copyrighted."[3] Based on the acknowledged and incontestable

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[3] See Precis of Argument by Counsel for Wheaton [pet'r], 33 U.S. (8 Pet.) at 615. Wheaton acknowledged, even while arguing that judicial opinions could be copyrighted, that "it would be absurd, for a legislature to claim the copyright; and no one else can do it, for they are the authors, and cause them to be published without copyright.... Statutes were never copyrighted." Id. Further, "it is the bounden duty of government to promulgate its statutes in print ..." *Id.* at 616.

Counsel for Peters, the respondent, emphasized the governing policy that "all countries ... subject to the sovereignty of the laws" hold the promulgation of the laws, from whatever source, "as essential as their existence." *Id.* at 618-19. Peters's brief continues:

> It is, therefore, the true policy, influenced by the essential spirit of the government, that laws of every description should be universally diffused. To fetter or restrain their dissemination, must be to counteract this policy; to limit, or even to regulate it, would, in fact, produce the same effect.
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> ...
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> If either statutes or decisions could be made private property, it would be in the power of an individual to shut out the light by

analogy with legislative acts, *Wheaton* held unanimously that "the law" in the form of judicial opinions may not be copyrighted.

The same broad understanding of what constitutes "the law" for copyright purposes underlies the Court's later decision in *Banks* v. *Manchester*, 128 U.S. 244, 9 S. Ct. 36, 32 L.Ed. 425 (1888). The Court there denied a copyright to a court reporter in his printing of the opinions of the Ohio Supreme Court. The Court first noted that whatever work the judges perform in their official capacity cannot be regarded as authorship under the copyright law. As a question of "public policy," the Court stated that,

> there has always been a judicial consensus, from the time of the decision in the case of *Wheaton* v. *Peters*, 8 Pet. 591, 8 L.Ed. 1055, that no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their judicial duties. *The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute.*

Banks, 128 U.S. at 253, 9 S.Ct. at 40. (emphasis added). At this point, *Banks* relied upon a decision of the Massachusetts Supreme Judicial Court, which stated,

> [I]t needs no argument to show that justice requires that all should have free access to the opinions, and that it is against sound public policy to prevent this, or to suppress

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which we guide our actions.

Id. at 620.

> and keep from the earliest knowledge of the public the statutes, or the decisions and opinions of the Justices.

Nash v. Lathrop, 142 Mass. 29, 6 N.E. 559 (1886). The court in Nash further observed that a legislature likewise could not deny public access to statutes.

Banks represents a continuous understanding that "the law," whether articulated in judicial opinions or legislative acts or ordinances, is in the public domain and thus not amenable to copyright.[4] Modern decisions have followed suit.[5] Significantly, the 1976 Copyright Act specifically denies protection to federal statutes and regulations. 17 U.S.C. § 105. Given the state law foundation of *Banks* and its progeny, there is no reason to believe that state or local laws are copyrightable. See generally L. Ray Patterson & Craig Joyce, *Monopolizing the Law: The Scope of Copyright Protection for Law Reports and Statutory Compilations*, 36 U.C.L.A. L. REV. 719, 751-58 (1989); 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.06[c] at 5-92 (2000) ("state statutes, no less than federal statutes, are regarded as being in the public domain"); 1 PATRY, COPYRIGHT LAW AND PRACTICE 351, 357 (1994).

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[4] In *Davidson* v. *Wheelock*, for example, the court stated that a compiler of state statutes "could obtain no copyright for the publication of the laws only; neither could the legislature confer any such exclusive privilege upon him." *Davidson* v. *Wheelock*, 27 F. 61, 62 (D. Minn. 1886). More famously, Justice Harlan, riding circuit, denied an injunction sought for the compiler of Michigan statutes, holding that "no one can obtain the exclusive right to publish the laws of the state in a book prepared by him." *Howell* v. *Miller*, 91 F. 129, 137 (6th Cir. 1898).

[5] *Harrison Co.* v. *Code Revision Commission*, 244 Ga. 325, 260 S.E.2d 30, 34 (1979); *State of Ga.* v. *The Harrison Co.*, 548 F. Supp. 110, 114-15 (N.D. Ga.1982), *vacated per stipulation*, 559 F. Supp. 37 (N.D. Ga.1983).

As governing law, pursuant to *Banks,* the building codes of Anna and Savoy, Texas cannot be copyrighted.

SBCCI and its numerous amici[6] must limit or circumvent the *Banks* line of cases in order to prevail. Initially, SBCCI divides *Banks* into two holdings and concludes that either holding must be squared with the policies and purposes of copyright law. This not insubstantial mode of analysis must be carefully reviewed.

The first holding of *Banks* is said to deny copyright to judicial opinions because judges, whose salaries are paid by the government, cannot claim to be "authors" of their official works. SBCCI contends that this discussion shows only that judges have no need of the Copyright Act's economic incentives in order to author judicial opinions. *Banks*, it is implied, articulates a utilitarian rationale for denying copyright protection to judicial opinions. SBCCI contrasts government employees with the private "authors" of model codes who allegedly depend on copyright incentives in order to perform their public service. SBCCI concludes that this "prong" of *Banks* does not apply to private code-writing organizations whose work has been adopted or incorporated into statutes, ordinances, or government regulations. Two courts, in addition to the panel that originally heard this case, have identified the consideration of authorship incentives as a "holding" of *Banks*.

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[6] The amici supporting SBCCI's position include Building Officials and Code Administrators International (BOCA), International Code Council, International Conference of Building Officials, American Medical Association, American National Standards Institute (ANSI), American Society of Association Executives (ASAE), American Society of Heating, Refrigerating and Air-Conditioning Engineers (ASHRAE), American Society of Mechanical Engineers (ASME), National Fire Protection Association (NFPA), Texas Municipal League, and Underwriters Laboratories, Inc. (UL).

See *Practice Management Info. Corp.* v. *American Medical Ass'n*, 121 F.3d 516, 518 (9th Cir.1997), opinion amended by 133 F.3d 1140 (9th Cir.1998);[7] *County of Suffolk* v. *First American Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir.2001).

The second "holding" of *Banks*, which requires "the law" or its exposition to be "free for publication to all," is recharacterized by SBCCI as a "due process" argument. That argument devolves into a factual question concerning public "access" to the law. Because SBCCI contends that there is no dispute about the adequacy of public "access" to its model codes, after their enactment as the building codes of Anna and Savoy, *Banks* is inapplicable.

The "dual holding" analysis seems to foist on *Banks* a rationale that the Supreme Court never explicitly articulated. *Banks*, however, does not bifurcate its holding based on the particular authors' need of the Copyright Act's incentives or a factual calculus concerning the "adequacy" of public access to the law. Instead, *Banks* declares at the outset of its discussion that copyright law in the United States is purely a matter of statutory construction. See *Banks*, 128 U.S. at 251, 9 S.Ct. at 39. In the next paragraph, the Court points out that the court reporter was not the statutory "author" of the judicial decisions. Then, the Court states that

> In no proper sense can the judge who, in his judicial capacity, prepares the opinion or decision, the statement of the case, and the syllabus, or head-note, be regarded as

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[7] *Practice Management* declares, "The copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyrightholders was not at stake in *Banks* because judges' salaries provided adequate incentive to write opinions." *Id.*

> their author or their proprietor, in the sense of [the copyright statute] ...
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> Judges, as is well understood, receive from the public treasury a stated annual salary, fixed by law, and can themselves have no pecuniary interest or proprietorship, as against the public at large, in the fruits of their judicial labors.

128 U.S. at 253, 9 S.Ct. at 40. The Court then broadly defines the judges' official work and states that as a matter of public policy and judicial consensus, "no copyright could, under the statutes passed by Congress, be secured in the products of the labor done by judicial officers in the discharge of their official duties." This paragraph of *Banks* climaxes with the explanation:

> The whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all, whether it is a declaration of unwritten law, or an interpretation of a constitution or statute. *Id.* at 253-54, 9 S.Ct. 36 [citing *Nash v. Lathrop*].

There is simply no independent holding in *Banks* that judges are not "authors" under the copyright law because, as public officials, they do not need the "incentives" that copyright law affords in order to write opinions. Instead, *Banks* refers to the source of the judges' salary in order to explain that it is the public at large, not the judges, who have the "pecuniary interest or proprietorship" in "the fruits of their judicial labors." The whole of those judicial labors, as *Banks* immediately defines

them, "constitutes the authentic exposition and interpretation of the law," which is "free for publication to all ..." *Id.*[8]

Moreover, when viewed in light of *Wheaton*, the last case relied on by *Banks's* analysis, the argument for bifurcation is seriously weakened. *Wheaton*'s holding, as has been shown, derives from an analogy between judicial opinions and legislative acts as together constituting "the law," which is not subject to copyright.

The origin of the bifurcated holding interpretation of *Banks* seems to lie in the First Circuit's thoughtful opinion in *Building Officials and Code Adm. v. Code Technology, Inc.*, 628 F.2d 730 (1st Cir.1980), but the First Circuit does not endorse bifurcation. In this opinion, which will be discussed further infra, the First Circuit considered the argument of *BOCA*, the model code writer, urging copyright protection for a model building code similar in origin and purpose to the one before us. *BOCA's* argument, the court said, "implies that the rule of Wheaton v. Peters was based on the public's property interest in work produced by legislators and judges, who are, of course, government employees." *BOCA*, 628 F.2d at 734.

While acknowledging that this interpretation is "not without foundation," the First Circuit cautioned: "But *BOCA's* argument overlooks another aspect of the ownership theory discussed in these cases." *Id. BOCA* then identifies the real premises of *Banks* and related cases: the "metaphorical concept of citizen authorship" of the law, together with "the very

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[8] If there were an independent holding in *Banks* relying on the fact that judges are paid by the public, it was rejected by the Court itself one month later, when the Court ruled that a court reporter, notwithstanding that he was a state employee, could assert copyright in all of his compilation of judicial opinions except the opinions themselves. Callaghan v. Myers, 128 U.S. 617, 9 S. Ct. 177, 32 L.Ed. 547 (1888).

important and practical policy that citizens must have free access to the laws which govern them." *Id.* *BOCA* cited the authorship rationale for *Banks* only to find it unsatisfactory. In our view, *BOCA* was correct.

Only by bifurcating *Banks* can SBCCI achieve its purpose of claiming authorship of "the law" and proprietary rights in its codes that have been enacted into law. However, the acceptance of SBCCI's and the dissent's theory, that non-governmental employees who draft model statutes or regulations may be entitled to copyright protection, raises troubling issues. The complexities of modern life and the breadth of problems addressed by government entities necessitate continuous participation by private experts and interest groups in all aspects of statutory and regulatory lawmaking. According to SBCCI, a utilitarian test should be invoked to determine which organizations "need" the incentives provided by the Copyright Act in order to perform the public service of drafting specialized statutes, ordinances or regulations. Alternatively, perhaps SBCCI and the dissent intend that whenever any private "author" finds his or her proposal adopted verbatim in law, copyright protection may be claimed.[9] As an example, three law professors have taken credit for drafting a recent federal statute on supplemental federal court jurisdiction. See 28 U.S.C. § 1367; Christopher M. Fairman, Abdication to Academia: The Case of the Supplemental Jurisdiction Statute, 28 U.S.C. § 1367, 19 SETON HALL LEGIS. J. 157 (1994). Under SBCCI's reasoning, it is

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[9] One of SBCCI's amici argues that this is an unrealistic threat, since, inter alia, the run-of-the-mill lobbyist or good citizen involved in the legislative process does not assert a copyright. That these "authors" may be more generous, or less sophisticated, than the large and well-funded code-writing organizations before us hardly furnishes a reason to approve an open-ended test of authorship of the law.

likely that these professors, had they so desired, could have asserted a copyright in their "model supplemental jurisdictional provision."[10] SBCCI offers no outer limit on claims of copyright prerogatives by nongovernmental persons who contribute to writing "the law."

Not only is the question of authorship of "the law" exceedingly complicated by SBCCI's and the dissent's position, but in the end, the "authorship" question ignores the democratic process. Lawmaking bodies in this country enact rules and regulations only with the consent of the governed. The very process of lawmaking demands and incorporates contributions by "the people," in an infinite variety of individual and organizational capacities. Even when a governmental body consciously decides to enact proposed model building codes, it does so based on various legislative considerations, the sum of which produce its version of "the law." In performing their function, the lawmakers represent the public will, and the public are the final "authors" of the law.

The *BOCA* decision put it thus:

> The citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions, because the law derives its authority from the consent of the public, expressed through the democratic process.

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[10] We are not stating or holding that the authorship of government works never presents a legitimate issue of copyright. On the contrary, the Copyright Act carefully defines the extent to which federal government employees and contractors can obtain copyright protection. But these provisions have never been held to supersede *Banks 's* holding that "the law" is in the public domain.

628 F.2d at 734.[11] This "metaphorical concept of citizen authorship" together with the need for citizens to have free access to the laws are the ultimate holding of *Banks*. *Id.*

BOCA described free access as a policy "based on the concept of due process," the people's right to know what the law requires so that they may obey it and avoid its sanctions. SBCCI and the dissent contend that this "due process" reasoning involves nothing more than the factual issue of "sufficient" public access to the building codes of Anna and Savoy. Since a copy of the codes is available for inspection and individual copying in a public office, SBCCI contends that the obligations of due process are fulfilled.

We disagree that the question of public access can be limited to the minimum availability that SBCCI would permit. *Banks* does not use the term "due process." There is also no suggestion that the *Banks* concept of free access to the law is a factual determination or is limited to due process, as the term is understood today. Instead, public ownership of the law means precisely that "the law" is in the "public domain" for whatever use the citizens choose to make of it. Citizens may reproduce copies of the law for many purposes, not only to guide their actions but to influence future legislation, educate their neighborhood association, or simply to amuse. If a citizen wanted to place an advertisement in a newspaper quoting the Anna, Texas building code in order to indicate his dissatisfaction with its complexities, it would seem that he could do so. In our view, to say, as *Banks* does, that the law is

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[11] Technically, citizen "ownership" of the law might suggest that local governmental entities, as public representatives, could prevent copying of the law. As Goldstein notes, the decisions holding that statutes are in the public domain prevent any such misunderstanding. 1 GOLDSTEIN, COPYRIGHT, § 2.48 at n.42.

"free for publication to all" is to expand, not factually limit, the extent of its availability.

Moreover, as the *BOCA* decision observed, it is difficult to reconcile the public's right to know the law with the statutory right of a copyright holder to exclude his work from any publication or dissemination. SBCCI responds that due process must be balanced against its proprietary rights and that the fair use doctrine as well as its honorable intentions will prevent abuse. Free availability of the law, by this logic, has degenerated into availability as long as SBCCI chooses not to file suit.[12]

For these reasons, we reject SBCCI's deconstruction of *Banks* into merely utilitarian and factual issues. Instead, we read *Banks*, *Wheaton*, and related cases consistently to enunciate the principle that "the law," whether it has its source in judicial opinions or statutes, ordinances or regulations, is not subject to federal copyright law.[13]

To sum up this section, we hold that when Veeck copied only "the law" of Anna and Savoy, Texas, which he obtained from SBCCI's publication, and when he reprinted only "the law" of those municipalities, he did not infringe SBCCI's copyrights in its model building codes. The basic proposition

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[12] SBCCI does not permit governmental entities to publish its model codes when they are enacted. Instead, it permits their adoption by reference and furnishes a copy of the adopted code to the entity. SBCCI also generously allows that if a governmental entity were to publish the building code on an Internet site to meet its due process obligation, that would be a fair use. But when the North Carolina Building Officials were permitted to publish a model code on their non-public access website, SBCCI expressly reserved its rights.

[13] What constitutes "the law" when a governmental entity adopts or incorporates by reference an author's copyrightable work will be considered infra, Part III.

was stated by Justice Harlan, writing for the Sixth Circuit: "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book ..." *Howell* v. *Miller*, 91 F. 129, 137 (6th Cir.1898).[14] See Jerry E. Smith, Government Documents: Their Copyright and Ownership, 22 Copyright Symposium 147, 174 (ASCAP 1977), reprinted in 5 TEX. TECH L. REV. 71, 92 (1973).

II. The Copyright Act

A. The Merger Doctrine

As we earlier stated, SBCCI is the "author" of model building codes that, qua model building codes, are facially copyright-protected. This is true even if *Banks* places the building codes of Anna and Savoy, and other governmental entities that adopted part or all of SBCCI's model codes, in the public domain. But if the holding of *Banks* fails, Veeck alternatively asserts a defense under the Copyright Act to the protection of the model codes after they have been enacted into positive law. Once adopted, he asserts, the model codes become "facts" that are not protected under the Copyright Act. Further, because there is only one way to express the meaning of the building codes, the "idea" embodied in the law merges with SBCCI's expression, and at that point, renders copyright protection unavailable.

It is not the sole purpose of copyright law to secure a fair return for an author's creative labor. Under the Constitution,

> The primary objective of copyright is not to reward the labor of authors but "[to] promote the Progress of Science

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[14] Our decision might well be the opposite, if Veeck had copied the model codes as model codes, or if he had indiscriminately mingled those portions of "the law" of Anna and Savoy adopted by their town councils with other parts of the model codes not so adopted.

> and the useful Arts." Article I, Sec. 8, clause 8 [U.S. Constitution]. To this end, copyright law assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorships.

Feist Publications, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 349, 111 S.Ct. 1282, 1289-90, 113 L.Ed.2d 358 (1991). The statute excludes from copyright protection ideas, procedures, processes, systems, methods of operation, or information in the public domain. See 17 U.S.C. § 102(b); *Feist Publications*, 499 U.S. at 350, 111 S.Ct. at 1290 (citation omitted); *Harper & Row Publishers, Inc.* v. *Nation Enters.*, 471 U.S. 539, 547-48, 105 S. Ct. 2218, 2223, 85 L.Ed.2d 588 (1985). If an idea is susceptible to only one form of expression, the merger doctrine applies and § 102(b) excludes the expression from the Copyright Act. As the Supreme Court has explained it, this "idea/expression dichotomy strike[s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression." *Harper & Row*, 471 U.S. at 556, 105 S. Ct. at 2228.

Veeck copied the building code of the towns of Anna and Savoy, Texas, based on their adoption of a version of the SBCCI model code. The codes are "facts" under copyright law. They are the unique, unalterable expression of the "idea" that constitutes local law. Courts routinely emphasize the significance of the precise wording of laws presented for interpretation. *See, e.g.*, *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a

statute is the language of the statute itself."). Judge Little, dissenting from the panel opinion in this case, observed that

> ... the merger doctrine is especially appropriate because other methods of expressing the idea are foreclosed. [citation omitted] An individual wishing to publish the text of a law cannot develop his own, unique version and still publish an authoritative copy.

Veeck v. *Southern Bldg. Code Cong. Int'l*, 241 F.3d 398, 416 (5th Cir. 2001) (Little, J., dissenting). It should be obvious that for copyright purposes, laws are "facts": the U.S. Constitution is a fact; the Federal Tax Code and its regulations are facts; the Texas Uniform Commercial Code is a fact. Surely, in principle, the building codes of rural Texas hamlets are no less "facts" than the products of more august legislative or regulatory bodies. While the Supreme Court has not stated directly that laws are "facts," it has broadly observed that, as with census data, "the same is true of all facts — scientific, historical, biographical and news of the day. 'They may not be copyrighted and are part of the public domain available to every person.'" *Feist*, 499 U.S. at 348, 111 S.Ct. at 1289.

Emphasizing not the language of § 102(b), but the "policy" of the merger doctrine, SBCCI contends that merger poses no bar to copyright protection here. The idea/expression dichotomy was enacted into law by Congress to "balance [ ] the competing concerns of providing incentive to authors to create and foster[ ] competition in such creativity." *Kern River Gas Transmission Co.* v. *The Coastal Corp.*, 899 F.2d 1458, 1463 (5th Cir.1990).[15] Veeck's merger argument ignores the goal of fostering competition in creativity. SBCCI thus asserts that "merger would only apply in this case if a subsequent author

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[15] *See id.* at 1460 (proposed route for a pipeline approved by the Federal Energy Regulatory Commission was an uncopyrightable "idea").

seeking to create a building code for Anna or Savoy would have to use the same expression to convey the idea." SBCCI supplemental en banc brief at 7. This argument effectively converts the merger doctrine from a limit on copyrightability into a mere defense against infringement based on the identity of the author. In our view § 102(b) does foster the creativity that SBCCI applauds, but it does so by permitting the free flow of information in facts and ideas from their emergence, rather than as a defense to infringement claims. See *Kern River* at 1460; *Mason* v. *Montgomery Data, Inc.*, 967 F.2d 135, 138 n.5 (5th Cir.1992) ("*Mason* argues that application of the merger doctrine does not render a work uncopyrightable, but rather prevents a finding of infringement of an otherwise copyrightable work. But this court has applied the merger doctrine to the question of copyrightability.").

SBCCI and the dissent next urge the inapplicability of the merger doctrine because there are many possible ways to express model codes: both the multiplicity of building standards and the variety of ways to express those standards compel the conclusion that the ideas have not merged with their expression. *Cf. Mason*, 967 F.2d at 139 (rejecting merger because the idea embodied in the author's maps can be expressed in a variety of ways). What SBCCI and the dissent ignore, however, is the graphic merger of its model building codes with "the law" as enacted by Anna and Savoy, Texas. Veeck copied from SBCCI's model codes, 1994 edition, because those codes were transformed into the "fact" and "idea" of the towns' building codes. Veeck could not express the enacted law in any other way.

The final argument deployed by SBCCI and the dissent casts the merger doctrine as an inherent balancing test in which courts must reconcile the policies underlying the Copyright Act with the public interest in the free flow of information and

ideas. Compare *CCC Info Serv., Inc.* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 68 (2nd Cir.1994) (interpreting Second Circuit's balancing test). It is true that where the line is unclear between expression and facts, procedures, processes, methods of operation, or information in the public domain, a court considering the applicability of § 102(b) must recur to the statute's underlying policy. *See, e.g.*, *Feist*, 499 U.S. at 361-64, 111 S.Ct. at 1295-97 (determining copyrightability of compilations of facts); *Mason*, 967 F.2d at 139 (copyrightability of expression in maps). This case, however, is not close. The building codes of Anna and Savoy, Texas can be expressed in only one way; they are facts. Veeck placed those facts on his website in precisely the form in which they were adopted by the municipalities.[16] When the § 102(b) dichotomy is clear, judges are not permitted to substitute policy choices for the legislature's determination.

We emphasize that in continuing to write and publish model building codes, SBCCI is creating copyrightable works of authorship. When those codes are enacted into law, however, they become to that extent "the law" of the governmental entities and may be reproduced or distributed as "the law" of those jurisdictions.

B. Other Provisions[17]

SBCCI's amici make much of provisions of the Copyright Act that, they contend, should protect SBCCI's copyrights from

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[16] For the first time, in this court, SBCCI alleges that Veeck did not exactly copy the ordinances, because in the course of their adoption, the towns rejected certain parts of the SBCCI model codes. There is no evidence in the district court record to sustain this contention.

[17] Veeck also raised infringement defenses based on his fair use of the model codes or SBCCI's waiver of its copyrights. It is unnecessary to reach these issues.

"appropriation" by local government entities. Section 105 of the Act, taken together with the definition of "works of the government," denies copyright protection to official works of the United States Government, while reserving the possibility that government employees and contractors may obtain, or transfer to the government, copyrights for non-official works. 17 U.S.C. §§ 105, 101. On its face, these provisions say nothing about the relationship between non- federal government entities and copyright holders. Moreover, they have never been held inconsistent with *Banks* or with the merger doctrine.

Section 201(e) of the Act reflects Congress's intention to protect copyrights from involuntary appropriation by government entities. 17 U.S.C. § 201(e). This is not, however, a "takings" case, not least because SBCCI urged localities to adopt its model codes. The issue in the case is not the voluntariness of the appropriation but the legal consequences flowing from the permission that SBCCI gave.

III. The Caselaw; Model Codes Versus Standards

Until recently in our history, it was understood that *Wheaton*, *Banks* and nearly every other pertinent case held that copyright protection may not be asserted for the text of "the law".[18] The basic proposition was stated by Justice Harlan, writing for the Sixth Circuit: "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book ..." *Howell* v. *Miller*, 91 F. 129, 137 (6th Cir.1898).

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[18] *See also Texas* v. *West Publishing Co.*, 882 F.2d 171, 174, 177 (5th Cir.1989), in which the State of Texas sought a declaratory judgment that West's copyright in their original arrangement of annotated Texas statutes was invalid. This court rejected the state's argument and observed in passing that West did not claim a copyright in the text of the statutes themselves or in any of the readily-available public compilations of statutes.

As of 1980, the noncopyrightability of "the law" appeared settled to the First Circuit in *BOCA*. The court focused on the real holding of *Banks* and accordingly vacated preliminary injunctive relief to the author of a building code adopted into law by the Commonwealth of Massachusetts.[19] The court held that *BOCA* had failed to carry its burden of distinguishing, for preliminary relief purposes, the Massachusetts building code from non-copyrightable statutes and judicial opinions. But the court then remanded the case for further development in light of the novelty of the issue, the insufficiency of the trial court record, and the apparent trend toward adoption of model codes by governmental entities. The court nevertheless was skeptical that *BOCA* would prevail, commenting

> it is hard to see how the public's essential due process right of free access to the law (including a necessary right freely to copy and circulate all or part of a given law for various purposes), can be reconciled with the exclusivity afforded a private copyright holder ...

BOCA, 628 F.2d at 730. Though not a definitive holding, *BOCA* clearly favors Veeck's position over that of SBCCI, and it is most closely on point.

The record has been developed in this case and, with the perspective gained from other recent caselaw and from the multiple submissions to the court, we have no hesitation in confirming *BOCA 's* predisposition against the copyrightability of model codes to the extent they have been adopted as law. But the limits of this holding must be explained. Several national standards-writing organizations joined SBCCI as amici out of fear that their copyrights may be vitiated simply by the common practice of governmental entities' incorporating their standards

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[19] *BOCA* is an amicus curiae in this case supporting SBCCI's position.

in laws and regulations.[20] This case does not involve references to extrinsic standards. Instead, it concerns the wholesale adoption of a model code promoted by its author, SBCCI, precisely for use as legislation. Caselaw that derives from official incorporation of extrinsic standards is distinguishable in reasoning and result. See *CCC Info. Services* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61 (2nd Cir.1994); and *Practice Management Info. Corp.* v. *American Medical Ass'n*, 121 F.3d 516 (9th Cir.1997), opinion amended by 133 F.3d 1140 (9th Cir.1998).

In *CCC Information Services*, a New York statute required insurance companies to use the "Red Book," a privately prepared and copyrighted list of projected automobile values, as one of several standards in calculating the payments upon the total loss of a vehicle. CCC Information Services systematically loaded portions of the Red Book onto its computer network and distributed the information to its customers. One of CCC's theories was that the Red Book had entered the public domain. The Second Circuit addressed the public domain issue briefly, stating that "we are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright." *CCC Info. Services*, 44 F.3d at 74. CCC notes the infringer's reliance on the *BOCA* decision, but it does not opine on that case, confining itself to the precise facts before the court.

Practice Management involved the American Medical Association's copyrighted coding system for reporting physicians' services and medical procedures. The Federal

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[20] See 63 Fed. Reg. 8545, 8554-55 (Feb. 19, 1998) (Office of Management and Budget Notice of Final Revision of Circular A-119) (directing federal agencies to adopt privately developed standards "whenever practicable and appropriate" to "eliminate[ ] the cost to the Government of developing its own standards").

Health Care Financing Administration (HCFA) contacted and then agreed with AMA to use the AMA's coding system for identifying physicians' services on Medicare and Medicaid reimbursement forms. AMA granted a "non-exclusive, royalty-free and irrevocable" license to HCFA, without restrictions on the government's ability to reproduce or distribute AMA's codes. There was no evidence that AMA had restricted the code's availability to anyone. The Ninth Circuit held that the HCFA's decision to adopt regulations requiring physicians to use a version of the AMA code on Medicaid claim forms did not place the code in the public domain under *Banks*. *Practice Management*, 121 F.3d at 519 ("[T]he AMA's right under the Copyright Act to limit or forgo publication of the [coding system] poses no realistic threat to public access.").

Both the Second and Ninth Circuits feared that reaching the opposite conclusion in those cases would have "expose[d] copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation." *Practice Management*, 121 F.3d at 519. The Ninth Circuit suggested that federal court rules regarding citations could invalidate the copyrightability of the Blue Book. *Id.* at 519 n.5. The Second Circuit feared that a ruling in favor of *CCC Information Systems* would call into question the copyrightability of school books once they were assigned as part of a mandatory school curriculum. *CCC Info Services*, 44 F.3d at 74.

These decisions, and the hypothetical situations they discuss, are all distinguishable from Veeck. If a statute refers to the Red Book or to specific school books, the law requires citizens to consult or use a copyrighted work in the process of fulfilling their obligations. The copyrighted works do not "become law" merely because a statute refers to them. See 1 GOLDSTEIN COPYRIGHT, § 2.49 at n.45.2 (noting that *CCC* and *Practice Management* "involved compilations of data that had

received governmental approval, not content that had been enacted into positive law"). Equally important, the referenced works or standards in *CCC* and *Practice Management* were created by private groups for reasons other than incorporation into law. To the extent incentives are relevant to the existence of copyright protection, the authors in these cases deserve incentives. And neither CCC nor AMA solicited incorporation of their standards by legislators or regulators. In the case of a model code, on the other hand, the text of the model serves no other purpose than to become law. SBCCI operates with the sole motive and purpose of creating codes that will become obligatory in law.

At first glance, *Practice Management* appears to pose a closer issue because the HCFA did not simply refer physicians to the AMA's coding system. The court's opinion directs the reader to HHS's notice in the Federal Register announcing that HCFA would require physicians to

> use exclusively a common procedure coding system. The system is the HCFA common procedure coding system (HCPCS). This coding system is to be used for coding procedures that have been performed ... and is basically used for determining reimbursement amounts. HCFA developed the HCPCS in 1979 and 1980 by using the AMA's CPT-4 [the copyrighted coding system] for physician services and adding HCFA-developed codes for some non-physician services. In addition, we developed conversion techniques to prevent unwarranted payment escalation.

50 Fed.Reg. 40895, 40897. To be precise, then, HCFA had its own coding system (the HCPCS) that incorporated AMA's code but also included additional information.

But unlike Veeck, Practice Management Information Corporation, a commercial publisher of medical textbooks, was not trying to publish its own version of the HCPCS. Practice Management desired to sell a cheaper edition of the AMA's code, which was also used by insurance companies and had other non-governmental uses. It is not clear how the Ninth Circuit would have decided the case if Practice Management had published a copy of the HCPCS. By analogy, the result in this case would have been different if Veeck had published not the building codes of Anna and Savoy, Texas, but the SBCCI model codes, as model codes.

IV. Policy Arguments

Many of SBCCI's and the dissent's arguments center on the plea that without full copyright protection for model codes, despite their enactment as the law in hundreds or thousands of jurisdictions, SBCCI will lack the revenue to continue its public service of code drafting. Thus SBCCI needs copyright's economic incentives.[21]

Several responses exist to this contention. First, SBCCI, like other code-writing organizations, has survived and grown over 60 years, yet no court has previously awarded copyright protection for the copying of an enacted building code under circumstances like these. Second, the success of voluntary code-writing groups is attributable to the technological complexity of modern life, which impels government entities to standardize their regulations. The entities would have to promulgate standards even if SBCCI did not exist, but the most

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[21] SBCCI's factual "evidence" on this point consisted of self- serving affidavits from its officers and employees, and proof that it earns perhaps 40% of its revenue from sales of the domestic model codes and amendments. No effort was made to show by what amount copying by people like Veeck would or could reduce the organization's revenue.

fruitful approach for the public entities and the potentially regulated industries lies in mutual cooperation. The self-interest of the builders, engineers, designers and other relevant tradesmen should also not be overlooked in the calculus promoting uniform codes. As one commentator explained,

> ... it is difficult to imagine an area of creative endeavor in which the copyright incentive is needed less. Trade organizations have powerful reasons stemming from industry standardization, quality control, and self-regulation to produce these model codes; it is unlikely that, without copyright, they will cease producing them.

1 Goldstein s 2.5.2, at 2:51.[22]

Third, to enhance the market value of its model codes, SBCCI could easily publish them as do the compilers of statutes and judicial opinions, with "value-added" in the form of commentary, questions and answers, lists of adopting jurisdictions and other information valuable to a reader. The organization could also charge fees for the massive amount of interpretive information about the codes that it doles out. In short, we are unpersuaded that the removal of copyright protection from model codes only when and to the extent they are enacted into law disserves "the Progress of Science and useful Arts." U.S. Const. art. I. § 8, cl. 8.

CONCLUSION

For the reasons discussed above, we REVERSE the district court's judgment against Peter Veeck, and REMAND with instructions to dismiss SBCCI's claims.

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[22] This court's opinion does not, of course, withdraw all copyright protection from the model codes qua model codes.

PATRICK E. HIGGINBOTHAM, Circuit Judge, joined by KING, Chief Judge, and W. EUGENE DAVIS and CARL E. STEWART, Circuit Judges, dissenting:

In this difficult case I am persuaded to join the view that would affirm the judgment of the district court. It is undisputed that Veeck copied the copyrighted product of SBCCI. That parts of the copied material contain the same expressions as the adopted codes of two Texas cities is no defense unless the use by the cities of the protected expression somehow invalidated SBCCI's copyright.

The cities could have hired counsel and engineers to draft a code, recouping its expense either from all taxpayers or by charging a fee to users for a copy of its ordinance. A city could also decide, on behalf of the citizens, to license a finished and copyrighted work. Either is a decision by elected representatives.

Against a refrain that "the law" belongs to the people, Veeck asked us to conclude, as a matter of federal common law, that the choice made by the voters of this municipality was not available to it. Its utility as a decisional norm aside, the refrain passes by the fact that it was legislators who chose what they thought was the most practical path, to adopt a technical code developed at the expense of others under a licensing agreement.

Nothing suggests that private entities will control access to "the law." A contrary vision persists while ignoring the assured access of persons interested in the language of the ordinance. We are not told what impediment a person interested in the ordinance will face that will not be avoided by the doctrines of fair use and implied license or the constitutionally footed right of persons to access the law. Nor does developed case law tell us.

Banks holds that judges, as public employees, cannot have a financial interest in the fruits of their judicial labors. It is a case about authorship, about the acquiring of copyrights by public officials, not a case invalidating the copyrights held by private actors when their work is licensed by lawmakers.

As for the merger doctrine, I am not persuaded that it brings anything more to the table. That doctrine reflects the narrow circumstance where an idea can be expressed only one way and hence protection of its expression gives way. A complex code, even a simple one, can be expressed in a variety of ways. That reality is not ended by choosing one manner of expression to enact and then pronouncing that this normative rule — "the law" — can only be expressed in one way. Of course, you have adopted the protected expression; the reasoning is wholly tautological. It is a restatement of the conclusion that adopting the codes invalidated the copyright, not an independent reason why that is so.

There is a strong argument for that conclusion and it can be simply stated without calling on the illusion of the merger doctrine: the thinness of the protection enjoyed by this specie of copyright is overcome by the stronger public policy of unfettered access to enacted law, a victory expressed in the conclusion that enacting the code into law put the expression in the public domain. Whether that is so is our question and the merger doctrine does not answer it. Rather we are pushed to decide this case by reconciling two competing policies, expressed at a high level of generality, not unlike the large-scale balancing characteristic of judicial findings of violations of substantive due process. Doing so lacks the accretive marks of case-by-case adjudication, vital to the discipline of judges wearing their "common law" hats. Perhaps we will reach that point in the seriatim course of deciding the cases. If and when

we do, the choices will come with more sharply defined features than the abstraction we now have.

Significantly the absence of easily-found answers to the large, broadly-stated policy choices calls for caution. As I earlier observed, these small cities were empowered by the work of SBCCI; they gained the benefit of uniformity in regulation with other cities in their codes as well as proven quality — with the ability to charge a small fee for copies. Any person wishing a copy of the code can obtain it. They can reproduce it for critical commentary or to express their displeasure with its content, even make copies to circulate in a campaign urging that it be rescinded.

It bears emphasis that the Congress is best suited to accommodate its Congressionally-created copyright protection with the extraordinary changes in communication trailing the development of the internet. Unless of course it is contended that some Constitutional principle denies Congress the power to authorize copyright protection for governmental entities wishing to adopt codes such as those before us today. And of course the state legislatures and the municipalities are differently situated in another relevant and vital way--the state enjoys an immunity that the municipalities do not. It is ironical that the federal courts are asked to accept a broadly stated principle that would regulate the states by decreeing that some federal principle denies them the choice of accepting or rejecting a license when absent its waiver of immunity the federal copyright regime is not enforceable against them. This unexplored territory offers a confusing backdrop and also counsels caution.

Another confusion must be put aside. When Veeck did his work, the code was already available on the internet, albeit subject to the terms of its license. Veeck's effort was to put the

code on the internet free of license. To accept Veeck's contention would invalidate the copyright on every model code except those in inventory that had never been adopted by any governmental body. Publishing adopted model codes as a set with the list of governmental bodies adopting them could be accomplished without honoring the copyright because there would be no copyright.

In sum, the suggestion that SBCCI's position asks this Court to extend the reach of the copyright law is exactly backwards. The copyrights at issue here were concededly valid before the cities adopted them as codes. The proper question is whether we should invalidate an otherwise valid copyright as well as the solemn contract between the governmental body and SBCCI. That aggressive contention must find stronger legs than the rhetoric it comes clothed in here. The contention comes with no constitutional or statutory text, except its reliance upon the merger doctrine, and that is wordplay. This is federal common law adjudication. Its hallmark must be case-by-case accretion and measured decision making, even if the case-by-case explanation of the permissible restraint upon the copying of an enacted code leads to the conclusion that Veeck urges today — and I am not yet willing to embrace — that invalidity of the copyright is the inevitable consequence of code adoption. Rather, I conclude that Veeck violated the explicit terms of the license he agreed to when he copied model codes for the internet and posted them. I decide no more.

WIENER, Circuit Judge, joined by KING, Chief Judge, and PATRICK E. HIGGINBOTHAM, W. EUGENE DAVIS, CARL E. STEWART, and DENNIS, Circuit Judges, dissenting:

Technical codes and standards have become necessary, pervasive, and indispensable ingredients of Twenty-First Century life in this country; regrettably, today's majority

opinion has a real potential of drastically changing the societal landscape through that opinion's predictably deleterious effects on these codes and standards, their authors, and the public and private entities that daily use and depend on them. Despite efforts to clothe its ruling in classic copyright lingo — "public domain," "fact/expression," "merger" — in holding for Veeck under the discrete facts of this case, the majority had to (and did) adopt a *per se* rule that a single municipality's enactment of a copyrighted model code into law by reference strips the work of all copyright protection, *ipso facto*. Firmly believing that for this court to be the first federal appellate court to go that far is imprudent, I respectfully dissent.

I. FACTS AND PROCEEDINGS

As the underlying facts are undisputed, I adopt the majority opinion's detailed recitation of the facts, supplementing it with the following observations contained in the record. The technical codes here at issue are not mere compilations; rather they are original, "from scratch" creations by SBCCI which rightfully enjoy copyright protection from their inceptions. In each of its codes, SBCCI asserts a copyright under which it claims the exclusive right to publish these codes or license their reproduction and publication. Despite its copyright, SBCCI ensures free access by specifying that once a governmental unit enacts such a model code into law, copies must be made available for inspection by the public in the enacting government's offices. As a general proposition, members of the public may make or obtain copies of portions of the adopted versions of SBCCI codes from city offices or local libraries, or

may purchase copies of the codes directly from SBCCI and from some third-party sources, such as bookstores.[1]

Several municipalities in North Texas have adopted SBCCI's codes, including the towns of Anna and Savoy. Veeck avers that he attempted to obtain a copy of the building code of his hometown of Denison, Texas, after learning that it had adopted SBCCI's Model Building Code as its own. Failing to locate Denison's building code at local bookstores or libraries, Veeck ordered copies of the codes that SBCCI had produced. He ordered these copies in electronic format directly from SBCCI.[2] According to Veeck, he later visited approximately twenty towns in North Texas, including Anna and Savoy, in an effort to obtain copies of their local building codes, not all of which had been produced by SBCCI. Veeck was not able to buy complete copies at any of the towns that he visited.[3] He apparently never attempted to view or copy the SBCCI codes in any city clerk's or other municipal offices of the towns that had enacted the codes by reference.

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[1] As noted by the majority members and nonmembers are charged different prices for copies of the codes. For example, members were charged $48 for a copy of SBCCI's 1994 Standard Building Code, for which nonmembers were charged $72.

[2] The record is not completely clear, but it appears that Veeck made no attempt to view or copy the codes in the Denison city clerk's office. When Veeck received the 1994 codes from SBCCI, he realized that Denison had adopted the 1988 version of the building codes. He posted the 1994 codes on his Internet site despite the fact that they were not the same as the version adopted by Denison.

[3] It appears that in some of the cities, the correct version of the building code was not available at alternative locations. For instance, Sherman, Texas, had adopted the 1997 version of the building code, but the local library had only the 1994 version on hand.

In contravention of the software license agreement and copyright notice included with the electronic version of the model codes he purchased from SBCCI, Veeck failed to identify the codes as the products of SBCCI when he posted them on his website. Instead, he simply (and inaccurately) [4] identified them as the building codes of Anna and Savoy, Texas. As detailed in the majority opinion, the litigation ensuing from this conduct culminated with the grant of summary judgment in favor of SBCCI on its claims for copyright infringement. As Veeck cannot legitimately find a safe haven in any of his affirmative defenses, the district court's order should have been affirmed.

II. ANALYSIS

A. Standard of Review

This case is on appeal from a grant of a summary judgment that dismissed Veeck's declaratory judgment action and granted SBCCI's requested copyright infringement and damages relief. We review the record *de novo*, applying the same standard as the district court.[5]

B. Merits

1. Overview

Despite the efforts of Veeck (and of those amici who support him and of the en banc majority opinion) to paint this case as a broad one with dire constitutional implications, the

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[4] Veeck did not include the enacting ordinances of either municipality. Anna's enacting statute, for example, includes ordinances resolving conflicts between the adopted SBCCI code and previous city laws and also includes a clarification regarding which city officials would be responsible for enforcing different sections of the code.

[5] *Morris* v. *Covan World Wide Moving, Inc.*, 144 F.3d 377, 380 (5th Cir.1998).

question before us is truly quite narrow. In fact, it is the majority opinion that creates drastic constitutional alterations by ruling in Veeck's favor, thereby improvidently decreeing an absolute and inflexible rule, ill-suited for modern realities. Conversely, had we held for SBCCI, we would have remained well within the precedential and persuasive boundaries of established copyright law. My analysis is necessarily delimited by the particular, undisputed facts of the case: Veeck is a non-commercial, non-educational, non-contractor, non-official, non-resident of either Anna or Savoy, who purchased a copyrighted work, replete with warnings about infringement, and published that work virtually in its entirety on the internet. Veeck published on his website the entire substantive portion of the model building code that he purchased from SBCCI, redacting only the identity of the code's author (SBCCI) and the statement that the code was copyright protected, and inserting that they were the codes of Anna and Savoy. Veeck's only professed justification for infringing SBCCI's copyrights was that two or more small municipalities in northern Texas — of which Veeck was neither a resident nor otherwise related to in any capacity, official or unofficial — had, at the invitation of the code's author, enacted the codes into law by reference. Because he cannot, Veeck does not contend that Anna or Savoy denied him access to their codes or that he (or anyone else) was unable to view the law to which the citizens of Anna and Savoy are subject. Had Anna, Savoy, or SBCCI blocked the code's availability, I would be among the first to recognize Veeck's (and anyone else's) right of access to "THE law." That, however, is simply not the case before us; this is not a free access case and cannot be so classified.

Under this narrow set of facts, Veeck prevails only because the en banc majority ruled favorably on at least one of his

affirmative defenses,[6] without which, his publication of the codes is indisputably an infringement of SBCCI's copyright. Given Veeck's global re-publication of SBCCI's copyrighted model codes, his at-best remotely tangential relationship to the codes and other laws of Anna and Savoy, his inability to present evidence that he was denied access to the towns' codes by the towns or SBCCI, the countervailing public policy concerns supporting copyright protection, and the direction and intent of recent congressional enactments and appellate case law, we should not have condoned Veeck's violation of SBCCI's copyright.

Reduced to its bare essentials, the majority's holding in favor of Veeck indisputably enacts the blanket, per se rule that once a copyrighted work is enacted into law by reference, it loses its entire copyright protection, *ipso facto*, regardless of the nature of the author, the character of the work, or the relationship of the copier to the work or to the governmental subdivision that enacted the work into law through incorporation by reference. Such an extremely broad and inflexible rule propels the majority's holding far beyond the ambit of Congress's enactments, the Supreme Court's pronouncements, and the opinions of other appellate courts that have addressed similar issues. Yet the possibility of obtaining such an all-encompassing ruling constituted Veeck's only hope of overcoming SBCCI's copyright protection vis-à-vis an otherwise admitted infringer who is too attenuated from anything that might otherwise excuse the unauthorized copying of these codes cum ordinances, such as a "need to know" for purposes of complying with one or more provisions of the codes. Veeck meets none of these criteria.

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[6] Veeck advanced defenses grounded in due process, public domain, fair use, waiver, copyright misuse, merger, and free speech.

2. *Due Process/Public Domain*

a. *Absence of Controlling Legal Authority*

In the absence of an expressed pronouncement from either the Supreme Court or Congress,[7] our creation of an automatic rule rendering the copyright of a model code nugatory *per se* when and if it is enacted into law is unwise, imprudent, and far in excess of our authority. *Before* such a work is enacted into law, the Copyright Act unquestionably affords copyright protection to its author; and Congress has given no indication that, on enactment, this protected status evanesces *ipso facto* as to the whole universe of potential copiers.[8] As I discuss in greater detail below, recent congressional enactments and accompanying federal agency policies strongly predict that, were Congress to address the issue here presented, it would

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[7] *Cf. CCC Information Services, Inc.* v. *Maclean Hunter Market Reports (CCC)*, 44 F.3d at 73-74 (2d Cir.1994) (discussing whether the Red Book, which was adopted by States as the legal standard for car valuations, passed into the public domain by virtue of its reference into the law):

> The [public domain] argument is that the public must have free access to the content of the laws that govern it; if a copyrighted work is incorporated into the laws, the public need for access to the content of the laws requires the elimination of the copyright protection.
>
> ...
>
> No authority cited by CCC directly supports the district court's view [the view that the Red Book had passed into the public domain]. ... We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright. (emphasis added).

[8] *Cf. County of Suffolk* v. *First American Real Estate Solutions*, 261 F.3d 179, 193 (2d Cir.2001) ("The determination that no one may own a copyright in statutes and opinions arises not from a specific provision of the Copyright Act, but from a 'judicial gloss' on the Act.") (citation omitted).

preserve the protection of SBCCI's copyright, at least under circumstances like those we consider today.[9]

As for the Supreme Court, its most analogous opinion, *Banks* v. *Manchester*, falls markedly short of answering the question.[10] The Court grounded its century-and-one-quarter old *Banks* holding — that judicial opinions cannot be copyrighted — in the logic that, as the product of judges who are paid from public coffers and elected or appointed for the sole purpose of interpreting and applying the law, judicial opinions can never be copyrighted.[11] Thus *Banks* turns not on the nature of the *work* but on the nature of the *author*. By its own terms, the *Banks* holding is obviously limited to the work of taxpayer-paid public officials who produce or interpret the law. The majority's stretching of *Banks* to the facts of the instant case constitutes a clear overreaching that finds no definitive support from any controlling authority.

In the absence of expressed congressional guidance or directly controlling Supreme Court precedent, we were left to address — prudentially — a wide-open and unresolved question of copyright law: Should the entirety of a privately confected and promulgated model code, access to which has been denied to none, lose its copyright protection *in toto*, against all the world, solely by virtue of its enactment into law by reference?

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[9] *See, e.g.*, National Technology and Transfer Act of 1995, P.L. 104-113, § 12(d), 110 Stat. 783 (1996); OMB Circular A-119, 63 Fed. Reg. 8545, 8555 (Feb. 19, 1998).

[10] *Banks* v. *Manchester*, 128 U.S. 244, 253, 9 S.Ct. 36, 32 L.Ed. 425 (1888) (holding judicial opinions uncopyrightable because they are created by judges paid from the public's coffers); see also *Wheaton* v. *Peters*, 33 U.S. 591, 668, 8 Pet. 591, 8 L.Ed. 1055 (1834) (same).

[11] This rationale is also applicable to statutes created by legislators paid by public funds.

If Congress or the Supreme Court wishes to strip totally the copyright protection otherwise enjoyed by model codes as an automatic result of being enacted into law, and to justify such emasculation by invoking the doctrines of free speech, due process, merger, or the like, that would be their prerogative. Prudence demands, however, that so large a step beyond all established legal boundaries should not have been taken first by an intermediate appellate court. Indeed, recent appellate case law, congressional pronouncements, and federal agency actions, predict the diametrically opposite result: a discernable trend towards greater governmental adoption of privately created codes with concomitant retention of copyright protection, tempered, of course, by express or implied consent or waiver — or even fair use — for those officials, residents, contractors, subcontractors, and design professionals who have a need to view and copy portions of codes to comply with their provisions.

b. Policy Analysis for Copyright Protection

What *Banks* and other opinions undeniably teach about assessing the copyright protection of works like the codes here at issue is that "[t]he question is one of public policy...."[12] Accordingly, these decisions do not stand for the abstract and generic proposition that all law qua law, regardless of its form, authorship, or content, is automatically unprotected fair game as to all copiers, without distinction. Hence, courts are given

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[12] *Banks*, 128 U.S. at 253, 9 S.Ct. 36; see also *CCC*, 44 F.3d at 68:

> We reach this conclusion [reversing summary judgment in favor of a publisher who copied portions of appellant's used car valuations which were referenced by state statutes] based on the need to balance the conflicts and contradictions that pervade the law of copyright, and the need, where elements of copyright law conflict, *to determine, as a policy judgment,* which of its commands prevails over the other. (emphasis added).

the weighty task of balancing, on the one hand, the policy concerns that favor the constitutionally mandated retention of copyright protection for privately authored works and, on the other hand, the policy concerns that would permit stripping the author of a privately created work of copyright protection once that work is enacted into law. I do not dismiss lightly the policy considerations supporting this latter concern. Yet, when properly limited to the narrow set of facts before us, the scale of countervailing policy considerations is tipped — slightly yet undeniably — in favor of enforcing SBCCI's copyright, vis-à-vis Veeck and any others (but only they) who are identically situated.

I begin with an assessment of the policy consideration supporting Veeck's position — namely, the due process and public domain concerns. As an initial matter, the type of due process asserted by Veeck is murky at best. He was not denied access to the codes by either the towns or SBCCI (indeed, he has never alleged that he even tried to attain access directly from either town, or his home forum for that matter), and he was never charged with or prosecuted for a code violation[13]; therefore, his claim cannot be based on procedural due process. And, inasmuch as copyright is a federal law, no state action could deprive him of a fundamental right that would trigger a substantive due process claim. Neither has Veeck pointed to any state actor who has purportedly denied him due process. Yet despite his unimpeded access to the law and the absence of state action, Veeck argues amorphously that his due process rights somehow allow him freely to copy and publish otherwise copyright-protected codes once they are enacted into law by reference.

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[13] Should some municipality, or SBCCI, ever truly restrict the public's free access to the enacted codes, any defendant prosecuted for violating sections of the building codes would surely prevail on a due process defense.

I reiterate for emphasis that this would be an entirely different case if Veeck's (or anyone's) access to the law had been denied or obstructed; instead, we deal here only with Veeck's bald pronouncement — now legitimated by the majority opinion — that, once a code is enacted into law, due process does not merely afford him access, but also gives him unfettered copying and dissemination rights.[14] The majority's acceptance of Veeck's position is truly a novel extension of any prior judicial recognition of a due process right. True enough, Veeck can copy and publish judicial opinions and statutes on his website with impunity. He can do so, however, not because of his due process rights, but rather because — as judicial opinions and legislatively drafted statutes have never enjoyed copyright protection, could never enjoy such protection, and are in the public domain from the moment of their inception — such works are entitled to no copyright protection or restrictions.[15]

Logically then, the only possible support for Veeck's due process position is his wholly unsupported assertion that, by virtue of their adoption into law by reference, the codes have entered the *public domain* and are therefore denuded of all copyright protection whatsoever, regardless of their content or the identity of the author or other interested parties. According

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[14] *Cf. Practice Management Information Corp.* v. *American Medical Association (Practice Management)*, 121 F.3d 516, 519 (9th Cir.1997) (in denying the *Practice Management's* due process/public domain argument, the court noted "*Practice Management* is not a potential user denied access to the CPT, but a putative copier wishing to share in AMA's statutory monopoly. *Practice Management* does not assert the AMA has restricted access to users or intends to do so in the future.").

[15] Moreover, as further discussed *infra*, wide, unrestricted dissemination of opinions and statutes has no possible harmful effects on the "creativity" of those who author judicial opinions and statutes; their jobs and their compensation have no nexus to their creativity, and vice versa.

to Veeck — and now our en banc majority — simply by virtue of their adoption into law, SBCCI's model codes have become "THE law"; and as THE law, all THE people (not just those who may be deemed metaphysically to have been the authors by virtue of their elected legislatures' acts of adoption) have an absolutely unfettered right to do whatever they please in the way of copying and publishing, in total disregard of the author's otherwise valid and enforceable copyright.

Admittedly, the majority's argument finds rhetorical support from the First Circuit's dicta in *Building Officials & Code Admin.* v. *Code Technology, Inc. (BOCA)*, in which that court stated "[t]he citizens are the authors of the law, and therefore its owners, regardless of who actually drafts the provisions because the law derives its authority from the consent of the public, expressed through the democratic process."[16] Undoubtedly, this metaphorical concept of citizen authorship cum ownership has great symbolic, "feel-good" appeal. The majority's uncritical application of that proposition to the instant case, however, naively treats all manifestations of "THE law" in our increasingly complex society monolithically and without differentiation. The Supreme Court took no such position in *Banks*; in fact, *Banks* addresses only judicial opinions and other pronouncements of the law created ab initio by publicly paid officials.[17] Furthermore, although the symbolic position advanced in *BOCA's* grandiloquent dicta ostensibly contemplates a broad application for the proposition of citizen authorship and control, *BOCA's* actual holding is very narrow

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[16] *BOCA*, 628 F.2d 730, 734 (1st Cir.1980).

[17] *County of Suffolk* v. *First American Real Estate Solutions*, 261 F.3d 179, 194 (2d Cir. 2001) ("*Banks* is properly read as requiring a determination whether the particular governmental entity or employee has adequate incentive to create the work absent copyright protections.").

and unrelated to any such abstract musings about the democratic process.

In fact, the *BOCA* court expressly avoided deciding whether *BOCA's* model code retained its copyright after enactment, noting that "the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes.... "[18] Therefore, the majority's rote application of the lofty platitude of citizen ownership of "THE law," without exploring the distinctions between different types of enactments and the policy considerations attendant on each, is far too simplistic. Such an analysis is inconsistent with the thorough policy evaluations evidenced by those courts that heretofore have deliberated on similar copyright issues.[19]

The privately created model codes enacted into law in this case are easily distinguishable from judicial opinions or statutes in several important respects. First and most obviously, model codes are not created by elected or appointed officials paid from public fisc, rendering inapt the mythical concept of citizen authorship. Indeed, to the exact opposite, rather than producing regulatory codes themselves, the officials elected as the citizens' voice chose, on behalf of their constituents, not to head down the long, expensive, and highly technical road of special code drafting, opting instead to adopt, cost-free, codes authored by private entities, because doing so is convenient, efficient, and cost-effective.

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[18] *BOCA*, 628 F.2d at 736 (emphasis added).

[19] *See Banks*, 128 U.S. 244, 9 S. Ct. 36, 32 L.Ed. 425; *County of Suffolk*, 261 F.3d 179 (2d Cir. 2001); *Practice Management*, 121 F.3d 516 (9th Cir. 1997); CCC, 44 F.3d 61 (2d Cir. 1994); *BOCA*, 628 F.2d 730 (1st Cir. 1980).

Second, these narrowly focused codes are detailed and complex, requiring technical expertise on the part of the author. Third, they are of limited, highly specialized effect as to who has a real interest and is actually affected, unlike judicial opinions and statutes, which generally have broad if not universal application.

Finally, Congress itself has provided the strongest support for the proposition that these privately created codes should be treated differently than other laws. Recognizing that the production of a comprehensive technical code requires a great deal of research, labor, time, and expertise, Congress in the National Technology and Transfer Act of 1995 (the "NTTA") expressly directs that "Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies...."[20] The OMB, in its

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[20] National Technology and Transfer Act of 1995, P.L. 104-113, § 12(d), 110 Stat. 783 (1996). I note that although the NTTA and the OMB Circular address the policy of using privately created standards and retaining copyright protection for those standards, they are still wholly applicable to the analysis of privately created codes. Rather than a substantive, meaningful legal distinction, Congress's and the OMB's references to "standards" rather than "codes," in all likelihood reflects the difference between federal and local lawmaking. Federal law, because it does not govern the safety and building ordinances of states or municipalities, generally addresses national standards instead of specific safety and building requirements embodied in a code. In substance, though, technical codes are "standards;" for purposes of today's decision, those terms are synonymous. The majority's purported distinction between standards and codes is far too narrow to decide the instant case on those grounds — it is a paradigmatic example of a distinction without a difference. The same principles that apply to the analysis of privately created standards apply to privately created codes — both deal with the protection afforded to privately organized and authored collections of hyper-technical data for use in a specialized segment of today's complex society that benefits from uniformity in those data. This understanding is supported both by appellate case law and evidenced by the standards-creating bodies filing amicus briefs in support of SBCCI's

Circular A-119, which was designed to provide guidance to federal agencies in the wake of the NTTA, requires that "[i]f a voluntary standard is used and published in an agency document, *your agency must observe and protect the rights of the copyright holder and any other similar obligations.*"[21] These pronouncements by Congress and the OMB strongly evince a recognition that the privately created regulatory codes and standards differ greatly from either judicial opinions or a statutes. Technical codes are indispensable resources in today's increasingly complex, high-tech society, and they deserve authorship protections not afforded to other types of "THE law."

The First Circuit's overbroad dicta in *BOCA* was announced in 1980, well before the advent of the internet and well *before* the announcement of the federal government's legislated policy directing the adoption of privately created codes to serve the principles of efficiency and economic competition.[22] Moreover, *recent* appellate case law supports the

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position. See *Practice Management*, 121 F.3d at 518-19 ("As the AMA points out, invalidating its copyright on the ground that the CPT entered the public domain when HCFA required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation.") (emphasis added); see also amicus filed by, inter alia, American National Standards Institute in support of SBCCI.

[21] OMB Circular A-119, 63 Fed. Reg. 8545, 8555 (Feb. 19, 1998) (emphasis added).

[22] *Id.* at 8554:

> The use of such standards, whenever practicable and appropriate is intended to achieve the following goals:
>
> a. Eliminate the cost to the Government of developing its own standards and decrease the cost of goods procured and the burden of complying with agency regulation.
>
> b. Provide incentives and opportunities to establish standards that

recognition of the clear differences between, on the one hand, privately developed standards that are adopted into law by reference and, on the other hand, law created by legislators and judges.[23] Thus, the majority's superficially appealing contention that from a policy perspective, "THE people" may do as they please with "THE law" rests on the flawed foundation that "THE law," irrespective of whether it be in the form of opinions, statutes, or regulatory standards or codes — and irrespective of by whom it is "made" — should be treated identically. Modern realities and case law directly contradict this simplistic abstraction: The policy considerations that

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serve national needs.

c. Encourage long-term growth for U.S. enterprises and promote efficiency and economic competition through harmonization [uniformity] of standards.

d. Further the policy of reliance upon the private sector to supply Government needs for goods and services. (emphasis added)

[23] *See County of Suffolk* v. *First American Real Estate Solutions*, 261 F.3d 179 (2d Cir.2001) (developing a two-pronged economic incentive/public need test to determine whether tax maps developed by the County of Suffolk were in the public domain from inception and therefore stripped of copyright protection; citing Practice Management and the panel opinion in Veeck, deciding that, as a matter of law, the county's tax maps were not in the public domain); *Practice Management*, 121 F.3d 516, *cert. denied*, 522 U.S. 933, 118 S. Ct. 339, 139 L.Ed.2d 263, *opinion amended by* 133 F.3d 1140 (finding that the American Medical Association did not lose the right to enforce its copyright when use of its promulgated coding system was required by government regulations); *CCC*, 44 F.3d 61, *cert. denied*, 516 U.S. 817, 116 S.Ct. 72, 133 L.Ed.2d 32 (upholding copyright of privately prepared listing of automobile values that states required insurance companies to use); see also 1 Melville B. Nimmer & David Nimmer, Nimmer on Copyright s 5.06[C], at 5-91 (2000) ("It is questionable whether [the due process clause] justifies the denial of copyright to a private person or group who produces such a model code.").

dictate unlimited and unrestricted publishing of judicial opinions and statutes simply do not appertain here.

The policy concerns supporting the retention of at least some copyright protection for SBCCI are more persuasive and probative. First and most importantly, unlike judges and legislators who are paid from public funds to issue opinions and draft laws, SBCCI is a private sector, not-for-profit organization which relies for its existence and continuing services, in significant part, on revenues from the sale of its model codes.[24] The necessity of maintaining the economic incentive of copyright protection for these private entities prompted the Ninth Circuit to rule in favor of the AMA's retention of its copyright in the Physician's Current Procedures Terminology ("CPT") despite a federal agency's adoption of the CPT:

> The copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyrightholders was not at stake in *Banks because judges' salaries provided adequate incentive to write opinions. In contrast, copyrightability of the CPT provides the economic incentive for the AMA to produce and maintain the CPT.* "To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity," a matter of particular significance in this context because of "the

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[24] Approximately one-third, or $3 million, of SBCCI's annual $9 million dollar revenue is generated by sales of model codes to contractors and other interested parties. The remaining revenue is mainly derived from the annual fees of voluntary members and member organizations. Voluntary members include scholars, builders, contractors, and governmental entities that have adopted the code.

increasing trend toward state and federal adoptions of model codes."[25]

This approach is also consistent with the Second Circuit's two pronged test in *County of Suffolk* for determining whether a work may be deemed to be in the public domain: "(1) whether the entity or individual who created the work needs an economic incentive to create or has a proprietary interest in creating the work and (2) whether the public needs notice of this particular work to have notice of the law."[26] Here, without the ability to control unrestricted gratuitous dissemination of its model codes, SBCCI would lose significant revenue, in turn substantially impinging on the financial incentive and ability to continue creating and revising its model codes, absent some alternative source of funds.[27]

The importance of affording organizations like SBCCI protection from attenuated third parties like Veeck — even when motives are pure and unfair financial competition is not the goal — is best underscored by verbalizing the natural consequence of reducing the revenues, and thus the creative incentives, for organizations like SBCCI. Without private code-creating entities, our smaller towns — and even some of our larger cities, states, and agencies of the federal government — would be forced to author their own regulatory codes. Such

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[25] *Practice Management*, 121 F.3d at 518 (quoting 1 Nimmer on Copyright s 5.06[C], at 5-92 (1996))(emphasis added).

[26] *County of Suffolk*, 261 F.3d at 194.

[27] We note here that the second prong of the County of Suffolk test is no barrier. As stated above, although the codes are necessary for a citizen to have proper notice of the building code regulations of Anna and Savoy, no allegations have been made here to suggest that Veeck was denied notice or access to the codes. We stress that the right of unlimited republication is a far cry from the rights of access to and notice of the law.

a task would inefficiently expend the time and resources of the legislative and executive bodies of these governmental entities, not to mention the question of available expertise. To create codes of appropriate detail, accuracy, and information, governmental bodies would have to enlist the aid of technical experts, undoubtedly at considerable cost. Finally, causing municipalities, states, and the federal agencies to engage in this activity could lead to innumerable variations of any given code, thereby undermining uniformity and, with it, safety and efficiency. For small towns like Anna and Savoy, such a result could be even more detrimental, as their limited resources well might be insufficient to absorb the costs of creating their own codes. Ultimately, taxpayers would end up paying for a service that is currently provided efficiently, expertly, and at no expense to them.

I hasten to add that, for my analysis to have force, SBCCI need not be put completely out of business. Continued maintenance of a revenue source from sales of codes to individual owners, architects, engineers, materials suppliers, builders and contractors as well as libraries and other more attenuated purchasers, all of whom buy copies of the codes directly from SBCCI, serves another public interest. I refer to the continuation of SBCCI's independence from the self interest of its dues-paying members, who otherwise might be in a position to command more influence were SBCCI forced to obtain too great a share of its revenue from such supporters. Clearly, SBCCI's receipts from sales of the codes substantially reduces the potential for greater dependence on its membership, presumably allowing SBCCI to operate without becoming entirely beholden for its existence to self-interested entities.

Finally, denying the Veecks of the world unrestricted republication and dissemination rights does not obstruct reasonable and necessary usage of and compliance with the

adopted codes. I remain confident that the copyright doctrines of fair use and implied license or waiver are more than adequate to preserve the ability of residents and construction industry participants to copy any portions of the code that they want or need to view. The fair use doctrine would also protect the use of the code, or portions of the code, as a teaching tool and would allow experts, lawyers, and judges freely to cite the code in their briefs or opinions without infringing SBCCI's copyright. These existing internal safeguards in copyright law show up the majority's dire predictions for the unrealistic hyperbole that they are.

It is important to keep in mind the record reality that neither Anna and Savoy themselves, nor builders, contractors, design professionals, or residents of Anna or Savoy, have complained of denied access to the codes or being hampered in their efforts to use, copy, or comply with the codes in a manner consistent with copyright law. Thus, the well-established doctrines of implied license and fair use preserve the public interest by allowing copyright protection to co-exist peacefully with all convenient and necessary use of the model codes.

In sum, Veeck has no real support for his infringement, being relegated to his abstract solipsism that due process immunizes any republication of the SBCCI's model codes once they are enacted into law by reference. This court's en banc majority holding today ignores case law from the Supreme Court and other appellate courts, which have instructed us that our conclusion here cannot be based on absolute or generic pronouncements regarding the nature of THE law. Instead we should reach our conclusion only after a careful weighing of the policy considerations of due process and copyright law in the unique framework of the particular facts of each case. Moreover, to the extent that recent congressional enactments and federal agency policies give guidance, they indicate that

SBCCI's copyright protections should be respected despite adoption of its codes into law.

Summarizing all pertinent factors — (1) the lack of controlling precedent from the Supreme Court or specific guidance from Congress on the issue, (2) federal law and federal agency policy encouraging the adoption of model codes and increasing the trend toward federal and state adoption of model codes, (3) the palpable distinction between the model codes at issue here and judicial opinions or legislative enactments, (4) case law from our fellow circuits that supports the retention of copyright protection even after adoption by reference into law, (5) the complete absence of any denial of access, (6) the truism that neither due process nor the metaphorical concept of citizen ownership of the law mandates totally unrestricted publication of adopted model codes, (7) SBCCI's identity as a private not-for-profit company which, unlike courts and legislatures, needs self-generated financial resources to continue independently creating and modifying its codes, (8) the knowledge that governmental obtain, free of cost, accurate, efficient and uniform regulatory codes which otherwise would be time-consuming and expensive (if not impossible in many instances) to develop in SBCCI's absence, and (9) the comfort that all reasonable and necessary use, copying, and republication by building owners, builders, contractors, design professionals, teachers, lawyers, as well as citizens and officials of the towns themselves, is assured protection by the fair use and implied license doctrines — convinces me that the public policy scale is tipped in favor of enforcing SBCCI's copyright protection against Veeck, who has never been denied access to the codes of Anna and Savoy and almost certainly never will be (but, if he ever is, he has alternative remediation available).

Finding that, on balance, these policy considerations favor SBCCI, I would conclude as a matter of law that, despite being adopted into law, SBCCI's codes are not in the public domain, and that Veeck's due process rights cannot be stretched far enough to permit his completely unrestricted copying and dissemination of SBCCI's codes. Veeck's other statutory and constitutional defenses similarly fail.

3. The Idea/Expression Dichotomy and Merger

Veeck insists (and now a majority of the active judges of this court agree) that the model codes lose their copyright protection by virtue of the idea/expression (or fact/expression) dichotomy in copyright law.[28] Veeck's basic contention is that when a model code is enacted into law by being adopted by reference, it automatically metamorphoses from "expression" to emerge as an "idea" — and that as an idea, it cannot be protected.[29] Relatedly, he contends that the doctrine of "merger" applies to nullify protection for expressions of an idea any time that there are only one or a very limited number of

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[28] 17 U.S.C. s 102(b):

> In no case does copyright protection for an original work of authorship extend to an idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

See also Feist Publications, Inc. v. *Rural Tel. Serv. Co.*, 499 U.S. 340, 349, 111 S. Ct. 1282, 113 L.Ed.2d 358 (1991) ("[C]opyright law assures authors the right to their original expression, but encourages others to build freely upon the ideas and information conveyed by a work. This principle, known as the idea/expression or fact/expression dichotomy, applies to all works of authorship.")

[29] *Mason* v. *Montgomery Data, Inc.*, 967 F.2d 135, 138 (5th Cir.1992) ("Thus, while a copyright bars others from copying an author's original *expression* of an idea, it does not bar them from using the idea itself.") (emphasis in original)

ways to express a given idea.[30] The cornerstone of both arguments is the definition of "idea" in the context of a model code that has been enacted by reference.

a. Defining "Idea"

Veeck's argument fails because it misapprehends and misapplies the "idea" concept in copyright law. "Idea" in copyright law is a term of art which does not track its everyday, dictionary meaning. What constitutes an "idea" in the lexicon of copyright law cannot be determined by empirically analyzing a given fact situation until the nascent dividing line between the "idea" and its "expression" finally crystallizes; indeed, just the reverse is true. Case law reveals that identification of the "idea" in a work is not the starting point but the *result* of a judicial exercise that in turn is highly dependent on the precise factual situation being tested.[31] Therefore, designation of the enacted

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[30] Id. at 138:

> In some cases, however, it is so difficult to distinguish between an idea and its expression that the two are said to merge. Thus, when there is essentially only one way to express an idea, "copying the 'expression' will not be barred, since protecting the 'expression' in such circumstances would confer a monopoly of the 'idea' upon the copyright owner free of the conditions and limitations imposed by the patent law." (citations omitted).

[31] *Id.* ("A court's decision whether to apply the merger doctrine often depends on how it defines the author's idea. For this reason, in defining the idea the courts should be guided by 'the balance between competition and protection reflected in the patent and copyright laws.'") (citations omitted); *Peter Pan Fabrics, Inc.* v. *Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (L. Hand, J.)(discussing what the court termed as "verbal works," the court stated "[T]here can be no copyright in the 'ideas' disclosed but only in their 'expression.' Obviously, no principle can be stated as to when an imitator has gone beyond copying the 'idea,' and has borrowed its 'expression.' Decisions must therefore inevitably be ad hoc."); see also Nimmer on Copyright s 13.03[B][2][a] at 13-60 ("Merely stating the rule [17

code as an idea *vel non* is a legal *conclusion* to be reached by a court, not an initial factual finding to be gleaned intuitively. That determination of idea is *not antecedent* to a policy determination regarding the "copyrightability" of the code; to the contrary, it is the logical *end-product* reached after competing concerns are weighed judicially.[32]

Courts frequently must decide how and at what level to draw the juridical line between idea and expression for copyright purposes. Judge Learned Hand, applying the idea/expression dichotomy to determine if one author's play infringed the work of another playwright, remarked:

> Upon any work, and especially upon a play, a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. The last may perhaps be no more than the most general statement of what the play is about, and at times might consist only of its title; but there is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his "ideas," to which, apart from their expression, his property never extended. Nobody has ever been able to fix that boundary, and nobody ever can.[33]

U.S.C. § 102(b)], however, does not make any easier the task of drawing the line between where the idea ends and expression begins.").

[32] *Cf.* Nimmer on Copyright § 1.10[B][2] at 1-78 ("On the whole, therefore, it appears that the idea-expression line represents an acceptable balance as between copyright and free speech interests") (citing *United Video, Inc.* v. *F.C.C.*, 890 F.2d 1173, 1191 (D.C. Cir.1989)).

[33] *Nichols* v. *Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930). Commentators and courts have labeled this as Judge Hand's "abstractions test."

Our task in this case should have been to decide whether the "idea" embodied in the code is defined, at one extreme of the continuum, as the entire code itself in its tangible form, or if instead the "idea" is defined at a more removed and abstract level further along that continuum.

My foregoing analysis has already demonstrated that the policy considerations weigh in favor of granting SBCCI protection against Veeck and other copiers and republishers identically situated. Having laboriously arrived at this conclusion, and accepting that a building code can be expressed in myriad ways, I am convinced that the code in its tangible entirety is not the unprotected "idea" in this situation.[34] None question that this is true for codes that have not been enacted globally into law by reference, and nothing of which I am aware can magically change the expression that is the copyrighted code into a copyright idea by the simple act of adoption as a body of law. Today I need not, and therefore do not, attempt to answer the question of exactly where to draw the line and define the idea presented here. It suffices that the idea at issue in the code is substantially more abstract than the physical entirety of the code itself; so as a matter of law, the code as a unitary whole is not an "idea" to be denied copyright protection absolutely, but rather is one among a significant number of possible "expressions."

b. Merger

Libertarian advocates of freedom from essentially all copyright protection attempt to find a safe harbor in the merger doctrine as a last resort when they do not prevail on the idea/expression dichotomy. The merger doctrine, however, is

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[34] In doing so, I acknowledge that specific portions and discrete facts within the code could be considered facts or ideas, and therefore unprotectable.

a limited exception in copyright law, intended to shelter only those rare cases in which the "idea" is susceptible of more than one expression, but the number of possible *expressions* is so finite and small as to have effectively "merged" with the *idea*.[35] Similar to the general misconception of the idea/expression dichotomy, the widely misunderstood merger doctrine also depends on the level of abstraction at which the court defines the "idea" that is alleged to have merged with its expression.[36]

Again, Veeck can find no immunity in the merger doctrine because there exists a plethora of ways to *express* a building code, thereby making the merger doctrine inapplicable. Although some among the many highly specific, technical, and detailed provisions within a building code might be susceptible of being expressed in only one or a handful of ways — and thus conceivably be subject to merger — a total, unitary building code, *in globo*, may be written, organized, and presented in any one of innumerable forms. All concede that many code-drafting organizations like SBCCI exist and that they are constantly creating competing versions of topical codes; yet each is *expressed* differently — and each is copyrighted. As there exist considerably more than a tiny, finite number of ways to express a building code, the merger doctrine is inapplicable and thus unavailable to insulate Veeck's infringement from copyright protection.

4. Other Affirmative Defenses to Copyright Infringement

Veeck also contends that even if the codes are not in the public domain and cannot be classified as "ideas," his code

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[35] See generally *CCC*, 44 F.3d at 68; Nimmer on Copyright s 13.03[B][3] at 13-68 — 13-73.

[36] See supra note 37.

copying and dissemination activities are protected by the doctrines of free speech, misuse, waiver, and fair use under copyright law.[37] I address each of these contentions in turn.

a. Free Speech

None contends that SBCCI made any attempt to use its copyright to block or interfere with the public's access to the municipal codes of Anna and Savoy, Texas. In *Schnapper* v. *Foley*, the District of Columbia Circuit held that the First Amendment does not require the voiding of a copyright, even in a government-commissioned work, absent evidence that access to the work had been denied.[38]

Dealing only with the record facts, I find that Veeck's Free Speech defense is further weakened by what he did *not* do: He did not first obtain copies of the codes of these two cities and then publish them on the Internet. Instead, he purchased directly from SBCCI a copy of all its 1994 Standard Codes, which arrived bearing a copyright notice and a license agreement. Ignoring these, Veeck copied that set onto his computer and posted it on his own website, identifying it as containing the municipal codes of the two towns but without advising the identity of the author or the fact of copyright. That which Veeck did and that which he did not do are inherently different: What he did not do comes closer to an interested party's fair use of his local building code;[39] what he did exemplifies a purchaser who assumes the risk of actively

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[37] Another defense, implied license, was raised by amicus curiae Association of American Physicians & Surgeons, Inc., but was not addressed by either party in the district court or on appeal. Hence, I do not address it. See *Christopher M.* v. *Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir.1991).

[38] 667 F.2d 102, 115-16 (D.C. Cir.1981).

[39] Veeck's fair use defense is discussed further infra.

disregarding the intellectual property rights held and announced by the author/supplier of a commercial product.

Factually, in enforcing its copyright in its model codes, SBCCI simply is *not* stifling access to, or speech about, THE law. SBCCI has not violated the First Amendment vis-à-vis Veeck.

b. Misuse

The equity-based defense of copyright misuse, which prevents a culpable author from prevailing in an action for the infringement of a misused copyright, "'forbids the [copyright holder's] use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which is contrary to public policy to grant.'"[40] In *Practice Management*, the Ninth Circuit concluded that the American Medical Association misused its copyright when it licensed its coding system to the Health Care Financing Administration. The copyright misuse was the AMA's imposition of a condition on its grant of a license that the licensee-agency agree not to use any competing system.[41] Veeck, in contrast, has raised no genuine issue of material fact regarding any purported misuse by SBCCI of its copyright. The summary judgment record is devoid of evidence that the organization mandates the exclusive use of its codes or any other of its services as a condition of a governmental subdivision's adopting one of the codes. There is thus no record evidence of facts constituting misuse that in turn would prevent enforcement of SBCCI's copyright.

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[40] *DSC Communications Corp.* v. *DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir. 1996) (quoting *Lasercomb Am., Inc.* v. *Reynolds*, 911 F.2d 970, 977 (4th Cir. 1990)).

[41] *Practice Management*, 121 F.3d at 520.

c. Waiver

Neither can Veeck prevail on his assertion that SBCCI expressly or impliedly waives its entitlement to copyright protection vis-à-vis the whole world when it successfully encourages municipalities to adopt its codes by reference. I readily concede that a copyright can be waived by the author's inaction.[42] Here, however, SBCCI expressly reserved its copyright in the codes. The district court found undisputed the fact that the materials Veeck received from SBCCI "contained the copyright expressions of the Defendant." Having concluded that SBCCI's codes are not in the public domain and that due process does not require suppression of SBCCI's copyright, I am convinced that the organization has done nothing to waive copyright protection expressly.

Copyright also may be waived implicitly by virtue of a particular act, even if waiver was neither explicit nor the intended result.[43] Veeck's argument in this regard is that by encouraging the towns to adopt the codes, SBCCI *impliedly* waived its copyright protection. This presupposes that waiver must be an "all or nothing" proposition, and thus cannot be implicit as to some parties, such as the adopting municipalities, without loosing its effectiveness altogether, even unto strangers like Veeck. Except for his bald assertion, however, Veeck presents no viable support for his waiver proposition. Moreover, when properly analyzed, his argument is nothing more than a thinly disguised reformulation of his due

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[42] *See, e.g., Sherrod* v. *American Airlines*, 132 F.3d 1112, 1119 n.5 (5th Cir. 1998).

[43] *See, e.g., Norma Ribbon & Trimming, Inc.* v. *Little*, 51 F.3d 45, 48 (5th Cir. 1995) ("Therefore, even if it be assumed that the ribbon flowers were copyrightable, the Littles through inadequate notice have made them part of the public domain, and Norma Ribbon was free to copy them.").

process/public domain argument — namely, that the mere fact of adoption automatically and totally vitiated SBCCI's copyright and superceded SBCCI's contractual protection as against all comers.

As fully explicated above, my analysis reaches the conclusion that, as a matter of law, SBCCI's codes are not in the public domain and that they retain their copyright protection against Veeck and others thus situated. I observe that the district court also concluded that the fact that SBCCI had given the North Carolina Building Inspectors Association permission to publish on the Internet that state's building codes, which are modeled on the SBCCI codes, does not constitute universal waiver. As the district court noted, "[c]ountless entities provide free access to materials on the Internet and still retain enforcement of their copyrights."

d. Fair Use

Finally, Veeck argues that his posting of SBCCI's copyrighted material on the Internet constituted a "fair use." Congress has excepted from infringement of copyrighted materials such specified uses as news reporting, teaching, and research.[44] Courts are instructed to consider four factors when deciding whether a particular use of copyrighted material is a "fair use":

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

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[44] See 17 U.S.C. § 107 (2000).

(4) the effect of the use upon the potential market for or value of the copyrighted work.[45]

When, as with Veeck's infringing activity here, the use of a copyrighted work is noncommercial, the ability to defeat an infringer's affirmative defense of fair use requires "proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[46]

The key question under the "purpose and character" prong is whether the alleged infringer's product "merely supersedes the objects of the original creation or instead adds something new with a further purpose or different character, altering the first with new expression, meaning, or message. In other words, it asks whether and to what extent the new work is 'transformative.'"[47] Veeck's posting of the codes on his website was not of a commercial nature or for nonprofit educational purposes. Neither did his actions in this case have any *transformative* effect on the original work.[48] In fact, there

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[45] *Id.*; see also *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S. Ct. 1164, 127 L.Ed.2d 500 (1994).

[46] *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 451, 104 S. Ct. 774, 78 L.Ed.2d 574 (1984).

[47] *Campbell* v. *Acuff-Rose Music Inc.*, 510 U.S. at 579 (citations omitted) (internal quotations omitted).

[48] In *Campbell* v. *Acuff-Rose Music*, while evaluating a fair use defense, the Supreme Court discussed the degree to which a parodist's work transforms a copyrighted original. See 510 U.S. at 579, 114 S. Ct. 1164. There, the parodist was the one making the transformation. In contrast, Veeck admits that he did nothing more than copy SBCCI's model codes verbatim; he did not transform them, through parody or otherwise. Therefore, Veeck's argument that the adoption by reference of SBCCI's codes by Anna and Savoy were "transformative" events does not find a home in *Campbell*.

is neither an apparent nor announced purpose behind Veeck's wholesale copying except that he chose to do so and believes, empirically, that he has the unfettered right to do so. He presents no affidavits or other summary judgment evidence to suggest that the townsfolk of Anna and Savoy or contractors, builders, or other interested parties, would not have access to the codes without Veeck's intervention.

The nature of the copyrighted work constitutes the second prong of the fair use analysis. The work at issue is an original technical code produced by a non-profit organization to encourage uniformity, safety, and economy in a technical area for the benefit of an increasingly complex society. Within the four-pronged jurisprudential test for fair use, Veeck's position finds its only viable support in this one factor. Although the code is an original work requiring creativity on the part of SBCCI, it is also an informational and functional work. This fact broadens the scope of the fair use defense.[49] In addition, the copyrighted work in this case is part of the regulatory codes of Anna and Savoy. Although this factor lends a modicum of support to Veeck's position, it (1) must be considered in light of all the other factors, and (2) is not as significant as the others in the fair use determination.[50]

The third fair use factor — amount and substantiality of portion used vis-à- vis copyrighted work as a whole — weighs heavily against Veeck. He published verbatim the entire set of codes obtained from SBCCI. Even though total copying does not automatically defeat a fair use defense, and partial copying

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[49] 4 Nimmer on Copyright s 13.05[A][2][a] (citing *Diamond* v. *Am-Law Corp.*, 745 F.2d 142 (2d Cir. 1984)).

[50] *Id.* (citing *Campbell* v. *Acuff-Rose Music Inc.*, 510 U.S. at 586, 114 S.Ct. 1164; *Robinson* v. *Random House, Inc.*, 877 F. Supp. 830, 841 (S.D.N.Y.1995)).

does not automatically validate it, the general rule is that reproduction of an entire work constitutes an unfair use.[51] Moreover, the codes copied here were not, literally speaking, "the" codes of Anna and Savoy: Even though the towns' ordinances adopted the model codes that Veeck copied, the enacting ordinances also contained modifications and clarifications not found in the verbatim versions of the SBCCI codes posted by Veeck.

Fourth, Veeck's use could have a substantially detrimental effect on the market for the copyrighted work. In considering this factor, we must assess the consequences of wide-spread conduct similar to Veeck's, not just his alone.[52] There is no genuine dispute, based on the summary judgment record, "that *some* meaningful likelihood of future harm exists."[53] Veeck's posting of the codes on the Internet could prove harmful by depressing the price and reducing SBCCI's market, thus depriving it of income used in its socially valuable efforts of confecting, promulgating, and revising model codes. Veeck's non-commercial, free publication of the codes exacerbates the detrimental effect on the potential market: By furnishing the codes entirely free of charge, he could effectively destroy the market rather than simply creating competition and price suppression. When viewed in this light, the free promulgation

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[51] *Infinity Broadcast Corp.* v. *Kirkwood*, 150 F.3d 104, 109 (2d Cir. 1998).

[52] *Campbell* v. *Acuff-Rose Music Inc.*, 510 U.S. at 590, 114 S. Ct. 1164 (consideration of the fourth factor "requires the court to consider not only the extent of the market harm caused by the particular actions of the alleged infringer, but also 'whether unrestricted and wide- spread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market' for the original.") (quoting 4 Nimmer on Copyright s 13.05[A][4]).

[53] *Sony Corp.*, 464 U.S. at 451, 104 S. Ct. 774 (emphasis added).

of a work is seen to be potentially more financially deleterious than is commercial piracy or cut-rate competitive availability. Currently, the sale of the copyrighted codes to builders, contractors, design professionals, and other interested parties (1) accounts for one-third of SBCCI's income, (2) provides incentive for SBCCI to stay in business so that small governmental subdivisions, like the ones at issue in this case, can obtain the benefits of a pre-crafted technical code, (3) fosters uniformity, and (4) provides some measure of independence to SBCCI from its members by holding down the extent of SBCCI's reliance on membership dues and assessments.

The situation presented in this case is not one of mere copying of the codes for personal use, or of Veeck's asking SBCCI for permission to post the codes on the web and having permission denied. As Veeck copied SBCCI's model code verbatim, the fair-use calculus weighs heavily against him. Veeck's total copying and promulgation of SBCCI's model code, and the potentially harmful effect of such copying on the market, render his use *unfair*.

C. SBCCI's Infringement Counterclaim

SBCCI holds valid copyrights in its codes, and Veeck has expressly admitted copying them. In the absence of a viable defense, the district court was correct in holding that SBCCI established copyright infringement. Under these circumstances, I am satisfied that the district court's conclusions and its award of an injunction and the minimum statutory damages on each of the five counts of copyright infringement are free of error.[54]

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[54] At the pertinent time, 17 U.S.C.A. § 504(c)(1) set the range of statutory damages for each act of copyright infringement at no less than $500 or more than $20,000. A 1999 amendment has raised those amounts to $750 and $30,000, respectively. *Id.*; Digital Theft Deterrence and Copyright Damages

Likewise, I find no abuse of discretion in the district court's award of attorneys' fees.[55]

III. CONCLUSION

Two decades ago, in *BOCA*,[56] the First Circuit wrestled with the serious issues raised by what was then only a "possible trend" toward local, state, and federal adoption of model codes.[57] That court wisely left open for future evaluation the modern realities surrounding technical regulatory codes and standards. As the *BOCA* court wrote, groups that develop such works "serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available."[58] In like manner, the two federal circuits that subsequently addressed challenges similar to that considered by the First Circuit in *BOCA* have declined to invalidate copyrights in works incorporated by reference into the law.[59] In the legislative arena, Congress has decreed the policy that federal agencies adopt privately authored technical standards without voiding the protection afforded to the authors by copyright; and the OMB has directed all federal agencies

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Improvement Act of 1999, Pub.L. No. 106-160, s 2(1), 113 Stat. 1774 (1999).

[55] *Hogan Systems, Inc.* v. *Cybresource Int'l, Inc.*, 158 F.3d 319, 325 (5th Cir. 1998) (applying abuse of discretion standard of review to award of attorneys' fees in copyright case). Veeck did not brief the questions of the district court's grant of a permanent injunction or award of damages and attorneys' fees, and therefore waived them.

[56] 628 F.3d 730.

[57] *Id.* at 736.

[58] *Id.*

[59] See *Practice Management*, 121 F.3d 516; *CCC*, 44 F.3d 61.

adopting such standards to respect the copyright protections of the copyright holders — the diametric opposite of causing copyright protection to vanish when the work is adopted as law.

I emphasize that my analysis is restricted to the narrow set of facts and circumstances before us. At bottom, I think it improvident for this court to legislate judicially an absolute, *per se* rule that referential enactment of a copyrighted work like a technical code into law mystically metamorphoses it into an "idea," puts it into the public domain, waives its copyright protection universally, and otherwise strips it of copyright protection *vel non*. Under the instant circumstances, no one is being denied reasonable access to the SBCCI codes that have been adopted *in globo* by local governments; neither does Veeck's specific actions, however altruistic they might have been, make a viable case for fair use. Nevertheless, I readily concede, that even slightly different facts under but slightly different circumstances could convince me to support a different result, albeit not a *per se* rule.

Today, the trend toward adoption of privately promulgated codes is widespread and growing, and the social benefit from this trend cannot be seriously questioned. The necessary balancing of the countervailing policy concerns presented by this case should have led us to hold that, *on these facts*, the copyright protection of SBCCI's privately authored model codes did not simply evanesce *ipso facto*, when the codes were adopted by local governments; rather, they remain enforceable, even as to non-commercial copying, as long as the citizenry has reasonable access to such publications cum law — and subject, of course, to exceptions for implied or express waiver or consent, fair use, or other recognized exceptions, when applicable. For these reasons, I cannot join in the majority's inflexible reasoning and unnecessarily overbroad holding. I therefore respectfully dissent.

APPENDIX B
PANEL OPINION

United States Court of Appeals,
Fifth Circuit.

Peter VEECK, d/b/a RegionalWeb,
Plaintiff-Counter Defendant-Appellant,

v.

SOUTHERN BUILDING CODE
CONGRESS INTERNATIONAL ~~INC.~~,
Defendant-Counter Claimant-Appellee.

No. 99-40632.
Feb. 2, 2001.

Appeals from the United States District Court for the Eastern District of Texas.

Before WIENER and STEWART, Circuit Judges, and LITTLE, District Judge.*

WIENER, Circuit Judge:

Plaintiff-Appellant Peter Veeck ("Veeck") appeals from a summary judgment of the district court holding that he infringed the copyright of Defendant-Appellee Southern Building Code Congress International ("SBCCI") when he posted SBCCI's copyrighted model codes on the Internet without SBCCI's permission. Agreeing with the district court, we affirm.

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* Chief Judge F.A. Little, Jr. of the Western District of Louisiana, sitting by designation.

I.

FACTS AND PROCEEDINGS

SBCCI is a nonprofit organization that develops, promotes, and promulgates model building codes, such as the Standard Plumbing Code, the Standard Gas Code, the Standard Fire Prevention Code, and the Standard Mechanical Code. SBCCI encourages local governments to enact its codes into law by reference, without cost to the governmental entity. In each of its codes, SBCCI asserts a copyright under which it claims the exclusive right to publish these codes or license their reproduction and publication. Once a governmental unit enacts such a code into law, copies are to be made available for inspection by the public in the enacting government's offices. Members of the public may make or obtain copies of portions of the SBCCI codes from city offices or local libraries or may purchase copies of the codes directly from SBCCI and from some bookstores as well. Although SBCCI is a nonprofit organization, it uses revenue from sales of its model codes to fund its continuing activities. Non- members are charged more for copies of SBCCI's model codes than are members of the organization. For example, members are charged $48 for a copy of SBCCI's 1994 standard building code, for which nonmembers are charged $72.

Veeck operates a nonprofit web site, known as RegionalWeb, which provides information about North Texas, including texts of local building codes. Several towns in North Texas have adopted SBCCI's codes, including the towns of Anna and Savoy. Veeck attempted to obtain a copy of the building codes of his hometown of Denison, Texas, after learning that Denison had adopted SBCCI's model code as its own. Failing to locate Denison's building code at local bookstores or libraries, Veeck ordered from SBCCI copies of its

codes in electronic format.[1] According to Veeck, he later visited approximately twenty towns in North Texas, including Anna and Savoy, in an effort to obtain copies of their local building codes, not all of which had been produced by SBCCI. Veeck was not able to buy complete copies at any of the cities he visited.[2] He apparently never attempted to view or copy the SBCCI codes in any city clerk's or other municipal office.

The package containing the computer disks that SBCCI sent to Veeck included a software license agreement and copyright notice. In disregard of these data, Veeck installed the codes on his personal computer and, by "cutting and pasting," was able to put the entire codes on his web site. Veeck's web site did not specify that the codes were written by SBCCI, instead simply identifying them as the building codes of Anna and Savoy, Texas.

When it learned that Veeck had posted copies of its codes on his web site, SBCCI sent him a cease and desist order, accusing him of infringing its copyrights. Veeck responded by filing this declaratory judgment action in an effort to have the district court rule that he did not violate the Copyright Act. SBCCI counterclaimed, asserting five counts of copyright infringement, as well as unfair competition and breach of

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[1] The record is not completely clear, but it appears that Veeck did not attempt to view or copy the codes in the Denison city clerk's office. When Veeck received the 1994 codes from SBCCI, he realized that Denison had adopted the 1988 version of the building codes. He posted the 1994 codes on his Internet site despite the fact that they were not the exact version adopted by Denison.

[2] Some of the cities apparently did not have the correct version of their building code available at alternative locations. For instance, Sherman, Texas, had adopted the 1997 version of the building code, but the local library had only the 1994 version on hand.

contract. Both parties moved for summary judgment on the copyright infringement issue.

In the absence of genuinely disputed material facts, the district court granted summary judgment in favor of SBCCI, holding that it held valid, enforceable copyrights and rejecting Veeck's defenses of fair use, copyright misuse, waiver, merger, and due process. The district court found five separate instances of copyright infringement — one for each separate model code that Veeck published on his web site — and granted a permanent injunction and monetary damages to SBCCI. Veeck appealed.[3]

II.

ANALYSIS

A. Standard of Review

This case is on appeal from a grant of summary judgment, dismissing Veeck's declaratory judgment action and granting SBCCI's requested copyright infringement relief. We therefore review the record *de novo,* applying the same standard as the district court.[4] A motion for summary judgment is properly granted only if there is no genuine issue as to any material fact.[5]

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[3] Appellate amicus briefs were filed in support of SBCCI by the American Medical Association, American National Standards Institute, American Society of Association Executives, American Society of Heating, Refrigerating and Air Conditioning Engineers, National Fire Protection Association, Texas Municipal League, and Underwriters Laboratories, Inc. Briefs in support of Veeck were filed by Professor Malla Pollack and the Association of American Physicians & Surgeons.

[4] *Morris* v. *Covan World Wide Moving, Inc.,* 144 F.3d 377, 380 (5th Cir.1998).

[5] Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

A fact issue is material if its resolution could affect the outcome of the action.[6] A dispute about a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party.[7] In deciding whether such an issue has been created, we must view the facts and the inferences to be drawn from them in the light most favorable to the nonmoving party — here, Veeck.[8]

The standard for summary judgment mirrors that for judgment as a matter of law.[9] Thus, the court must review all of the evidence in the record, but make no credibility determinations or weigh any evidence.[10] In its review, the court must disregard all evidence favorable to the moving party that the jury is not required to believe, and give credence to the evidence favoring the nonmoving party as well as to the evidence supporting the moving party that is uncontradicted and unimpeached.[11]

B. Copyright Infringement

The core purpose of copyright law is "to secure a fair return for an author's creative labor" and thereby "to stimulate artistic creativity for the general public good."[12] To establish copyright

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[6] *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[7] *Id.*

[8] *Olabisiomotosho v. City of Houston*, 185 F.3d 521, 525 (5th Cir.1999).

[9] *Celotex*, 477 U.S. at 323, 106 S.Ct. 2548.

[10] *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 120 S.Ct. 2097, 2102, 147 L.Ed.2d 105 (2000).

[11] *Id.* at 2110.

[12] *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 156, 95 S.Ct. 2040, 45 L.Ed.2d 84 (1975) (internal quotations omitted).

infringement, the plaintiff must prove a valid copyright and copying by the defendant of constituent elements of the work that are original.[13] Here, there is no question that SBCCI holds valid copyrights to the building codes and that Veeck copied the codes by placing them on the Internet. Veeck seeks to circumvent SBCCI's copyright protection, however, under various doctrines that serve as defenses to copyright infringement or otherwise limit copyright holders' exclusive use of their creations.

Veeck contends that once SBCCI's model codes are enacted into public law they lose their copyright protection under principles of due process, freedom of speech, and the affirmative defenses of merger, misuse, waiver, and fair use that are peculiar to copyright law. The instant case is one of first impression in this circuit, but three other circuit courts have examined the issue of enforcement of copyrights in the context of privately developed codes or compilations that had been enacted, in some form, into public law.[14] Although the First

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[13] *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 361, 111 S.Ct. 1282, 113 L.Ed.2d 358 (1991); *see also Lakedreams v. Taylor*, 932 F.2d 1103, 1107-08 (5th Cir.1991).

[14] *See Practice Mgt. Info. Corp. v. American Med. Ass'n* ("*Practice Management* "), 121 F.3d 516 (9th Cir.1997), *cert. denied*, 522 U.S. 933, 118 S.Ct. 339, 139 L.Ed.2d 263 (1997), *opinion amended by* 133 F.3d 1140 (9th Cir.1998) (finding that the American Medical Association did not lose the right to enforce its copyright when use of its promulgated coding system was required by government regulations); *CCC Info. Servs. v. Maclean Hunter Mkt. Reports, Inc.* ("*CCC* "), 44 F.3d 61 (2d Cir.1994), *cert. denied*, 516 U.S. 817, 116 S.Ct. 72, 133 L.Ed.2d 32 (1995) (upholding copyright of privately prepared listing of automobile values that states required insurance companies to use); *Building Officials and Code Adm. v. Code Tech., Inc.* ("*BOCA* "), 628 F.2d 730, 736 (1st Cir.1980) (declining to invalidate copyright of building code created by nonprofit group and adopted by the state, but simultaneously expressing doubt over the enforceability of the copyright given that the state had adopted the code); *see also* 1 Melville B.

Circuit expressed serious doubt that a privately authored building code adopted by the state of Massachusetts could be distinguished from uncopyrightable statutes and judicial opinions,[15] neither that court nor the other two circuit courts that have subsequently addressed the issue have held that codes lose their copyright protection when used or adopted by a state or local government. We decline to create a circuit split by reaching the opposite conclusion today.[16]

C. Defenses

1. Due Process/Public Domain

According to Veeck, the public's due process interest in free access to the building codes extinguishes SBCCI's copyright because the codes enter the public domain when they are enacted into law. At the outset, we note that although Veeck struggles mightily to raise a fact issue as to whether he was denied access to the codes, we agree with the district court that there is no probative evidence that the codes are not publicly available in North Texas towns. Leaving aside the issues of the codes' availability in bookstores, public libraries, and directly from SBCCI, we shall assume that due process requires at a minimum that the codes should be available for inspection and copying at the city offices in towns where they have been adopted by reference. Veeck has fallen short in his

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Nimmer & David Nimmer, Nimmer on Copyright § 5.06[C], at 5-91 (2000) ("It is questionable whether [the due process clause] justifies the denial of copyright to a private person or group who produces such a model code.").

[15] *See BOCA*, 628 F.2d at 735-36.

[16] *See supra* note 13; *see also* David S. Levitt, *Copyright Protection for United States Government Computer Programs*, 40 IDEA 225, 238 (2000) (citing cases "support[ing] the proposition that privately developed and properly copyrighted material should remain copyrighted material unless the material falls into the strict definition of statute or judicial opinion").

efforts to raise a genuine fact issue regarding such availability of the codes in Anna and Savoy.[17]

Inasmuch as there are no facts showing that Veeck was actually prevented or substantially hindered from viewing the public law, Veeck's claim poses the legal question whether a private entity that develops a code may maintain copyright in it once that code is adopted in globo as law. Not all reproductions of copyrighted work are "within the exclusive domain of the copyright owner; some are in the public domain."[18] Due process requires that the public have notice of what the law is so that the people may comply with its mandates.[19] Thus the

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[17] Had Veeck shown denial of access, we almost certainly would find that a material fact issue precluded summary judgment. The record shows, however, that Veeck has not raised a genuine question as to whether he or anyone else was denied access to the codes at any such city office. His unavailability claims center on Anna and Savoy, Texas, two extremely small communities with fewer than 1,000 residents apiece. When Veeck visited Savoy's city hall, he was told that the building codes were at the public works department, information he did not pursue. In Anna, after finding the city clerk twice absent, he made no further effort to view the codes. In his own affidavit, Veeck indicates that the codes may be publicly available in both towns, stating that "the codes are only available at the Anna and Savoy city halls during those times when city officials are available." Veeck simply has not succeeded at raising any genuine due process issue other than the fact that a tiny community occasionally may be forced by staff absence to close the doors to its city hall — hardly a constitutional violation.

Furthermore, had Veeck in fact been unable to obtain a copy of the enacted building codes because of SBCCI's copyright, we would likely conclude that due process provides grounds to invalidate such copyright. *See Practice Management,* 121 F.3d at 519. Given that Veeck was not precluded from viewing copies of the enacted codes, however, further legal analysis is needed.

[18] *Sony Corp. v. Universal City Studios, Inc.,* 464 U.S. 417, 433, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

[19] *See BOCA,* 628 F.2d at 734.

question is whether, once adopted into law, SBCCI's codes fall outside its exclusive domain and into the public domain by virtue of the requirements of due process.[20]

The First Circuit aptly described the quandary that we face today when it explained that even though the law is well established that "judicial opinions and statutes are in the public domain and are not subject to copyright," the question remains "whether this principle likewise covers state-promulgated administrative regulations which are modelled on a privately developed code that was copyrighted by the service-oriented organization responsible for its creation and updating."[21] In other words,

> The rule denying copyright to judicial opinions and legislative enactments was completely settled by the end of the nineteenth century. With the emergence of the regulatory state in the twentieth century, and the proliferation of administrative regulations, two new questions arose for copyright policy: Should copyright attach to texts that, though prepared privately, have received the imprimatur of official action? Should copyright attach to regulatory codes that, although drafted by private industry groups, have subsequently been enacted into law?[22]

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[20] The parties do not question the notion that the codes would not be copyrightable if they had been developed by *public officials*. *See, e.g., Banks v. Manchester,* 128 U.S. 244, 253, 9 S.Ct. 36, 32 L.Ed. 425 (1888) (holding judicial opinions uncopyrightable because they are created by judges paid from the public's coffers); *Wheaton v. Peters,* 33 U.S. (8 Pet.) 591, 668, 8 L.Ed. 1055 (1834) (same).

[21] *BOCA,* 628 F.2d at 734 (footnote omitted).

[22] 1 Paul Goldstein, *Copyright* § 2.5.2 (2d ed. 1996 & Supp.1999), at 2:47.

The second question is the one we must answer today.

More than 100 years ago, in *Banks v. Manchester,*[23] the Supreme Court held that a private reporter of the state's judicial opinions who desired to protect his compilation could not assert copyright for that purpose. The court rested this determination on two grounds. First, judicial opinions are not subject to copyright because they are publicly owned by virtue of the fact that the judges who render them are paid with public funds.[24] Second, as a matter of public policy, judge's opinions are not subject to copyright because the public interest is served by free access to the law.[25]

The Court's first ground is not applicable here: Unlike *Banks,* in this case SBCCI is asserting a viable proprietary interest because it created the model codes using its own, private resources. Nonetheless, the public policy concern announced in *Banks* remains vexatious. There, the Court declined to enforce the state reporter's copyright in judicial opinions because "[t]he whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all...."[26] This point would seem to apply equally to any statute, ordinance, or regulation that has the force of law irrespective of

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[23] 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888).

[24] *See id.* at 253, 9 S.Ct. 36.

[25] *See id.; see also Practice Management,* 121 F.3d at 518 (interpreting *Banks*).

[26] *Banks,* 128 U.S. at 253, 9 S.Ct. 36; *see also BOCA,* 628 F.2d at 734-35 (expressing doubt that a private entity that developed a building code was entitled to enforce copyright after the code was enacted into public law on the bases that (1) the public owns the law and pays the salary of those who draft legislation, and (2) the "right of the public to know the law to which it is subject").

authorship. But extrapolating broad generalities from such a narrow holding is risky.

The Second Circuit addressed this public policy argument in *CCC Information Services, Inc. v. Maclean Hunter Market Reports, Inc.*[27] That case involved a copyright infringement counterclaim brought by Maclean, the publisher of the "Red Book" projections of used car valuations, against CCC, a competitor that copied Maclean's valuations into a computer database for sale to customers. CCC's database also contained the average of each vehicle's valuations in (1) the Red Book and (2) the NADA Official Used Car Guide (known as the "Bluebook"), the other leading used car valuation book. A separate market exists for the Red Book/Bluebook average "because the laws of certain states use that average figure as a minimum for insurance payments upon the 'total loss' of a vehicle."[28] The trial court granted summary judgment for CCC based in part on the legal conclusion that the Red Book fell into the public domain when it was incorporated into governmental regulations.[29]

The Second Circuit reversed and granted summary judgment for Maclean. The appellate court found it necessary to "balance the conflicts and contradictions that pervade the law of copyright, and the need, where elements of the copyright law conflict, to determine, *as a policy judgment,* which of its commands prevails over the other."[30] In the instant case, as in *CCC,* a policy judgment is indispensable to our balancing of the public interests in, on the one hand, encouraging innovation

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27 44 F.3d 61 (2d Cir.1994).

28 *Id.* at 64.

29 *Id.*

30 *Id.* at 68 (emphasis added).

through copyright and, on the other hand, ensuring free access to the law.

We do not dismiss lightly the policy considerations supporting Veeck's position; yet, limited to the narrow set of facts before us, we perceive the scale of countervailing policy considerations to be tipped in favor of enforcing SBCCI's copyright.[31] We reiterate for emphasis that no court has held to the contrary.[32] We are further comforted in reaching this balancing result by the agreement of the leading treatise on the subject that to strip a copyright owner of his rights when his work is adopted by a state legislature would "prove destructive of the copyright interest in encouraging creativity in connection with the increasing trend toward state and federal adoptions of model codes."[33]

The Second Circuit analogized the claims it rejected in *CCC* to a hypothetical holding that schoolbooks lose their copyright once assigned in compliance with a school curriculum mandated by law.[34] We believe that if code writing groups like SBCCI lose their incentives to craft and update model codes and thus cease to publish, the foreseeable outcome is that state

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[31] *See id.* at 74 ("We are not prepared to hold that a state's reference to a copyrighted work as a legal standard for valuation results in loss of the copyright.").

[32] The First Circuit noted in *BOCA* that it was "far from persuaded that [plaintiff's] virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when, where, and how the Massachusetts building code is to be reproduced and made publicly available," but declined to rule on the ultimate merit of the case. *BOCA*, 628 F.2d at 735.

[33] 1 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright*, § 5.06[C], at 5-92 (2000).

[34] *CCC*, 44 F.3d at 74.

and local governments would have to fill the void directly, resulting in increased governmental costs[35] as well as loss of the consistency and quality to which standard codes aspire. A second glance at the names of the amici supporting SBCCI's position in this case[36] provides an idea of the potential sweep of a contrary holding that the authors of model codes could not enforce copyrights in their works once the ultimate reason for their very creation is realized. As amici state in their brief supporting SBCCI, "these codes and standards are widely used and adopted by local and state government and federal authorities throughout the United States who do not otherwise have the necessary facilities and resources to develop these safety standards independently."

Each of the three states comprising this circuit has statutes that refer to standards promulgated by SBCCI.[37] Examples of other private codes referenced in the statutes of Texas, Louisiana, and Mississippi are: (1) manufactured home standards adopted and published by the American National

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[35] *See* 63 Fed.Reg. 8545, 8554-55 (Feb. 19, 1998) (Office of Management and Budget Notice of Final Revision of Circular A-119) (directing federal agencies to adopt privately developed standards "whenever practicable and appropriate" to "eliminate[ ] the cost to the Government of developing its own standards"); National Technology Transfer and Advancement Act of 1995, Pub.L. No. 104-113, § 12(d), 110 Stat. 775, 783 (1996).

[36] American Medical Association; American National Standards Institute; American Society of Association Executives; American Society of Heating, Refrigerating and Air-Conditioning Engineers; American Society of Mechanical Engineers; National Fire Protection Association, Inc.; Texas Municipal League; and Underwriters Laboratories Inc.

[37] *See, e.g.,* Tex. Loc. Gov't § 235.002(c)(1) (Vernon 1999) (fire code); La.Rev.Stat. Ann. § 40:1722(B)(3) (West 2000) (building code); Miss.Code. Ann. § 45-11-73 (2000) (building code).

Standards Institute;[38] (2) the Uniform Plumbing Code and the National Standard Plumbing Code;[39] and (3) the codes of the National Board of Fire Underwriters, the National Fire Protection Association, and the American Society for Mechanical Engineers.[40] As the Ninth Circuit recently wrote when it declined to find that the American Medical Association's copyright of its medical procedure code ("the CPT") became unenforceable after a federal agency adopted it for use on Medicaid claim forms,

> invalidating [the AMA's] copyright on the ground that the CPT entered the public domain when [the Health Care Financing Administration] required its use would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation. Nonprofit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency.[41]

In *State of Texas v. West Pub. Co.*,[42] we could discern no due process violation in the absence of evidence that anyone was actually being denied access to the law. In the instant case, the district court likewise was presented with no evidence that Veeck or others had been denied access *vel non* to the codes in question; thus, there was no genuine issue of material fact on Veeck's due process claim. Neither does this case involve a citizen barred from photocopying applicable portions of

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38 La. Rev. Stat. Ann. § 51:911.23 (West 2000).

39 Tex. Rev. Civ. Stat. Ann. art. 6243-101, § 3 (Vernon 2000).

40 Tex. Nat. Res. Code Ann. § 113.052 (Vernon 2000).

41 *Practice Management,* 121 F.3d at 519 (footnotes omitted).

42 882 F.2d 171, 177 (5th Cir.1989).

municipal codes; on the contrary, Veeck ordered the SBCCI standardized codes directly from SBCCI and published those expressly copyrighted works on the Internet. Because under these facts we conclude as a matter of law that the codes here at issue had not entered the public domain, Veeck's act of copying infringed SBCCI's copyrights, and no due process or other policy concern excuses that infringement.

2. Merger

In his merger argument, Veeck contends that SBCCI's building codes, once enacted by reference into law, became a *fact* which can be *expressed* in only one way.[43] He argues, unsupported by precedent, that the adoption of SBCCI's code into law was a transformative event that instantly denuded the work of copyright protection. In other words, according to Veeck, there can be only one expression of the law: Once adopted by the government, the model code merged into the body of the law. Therefore, concludes Veeck, there was no other correct way to express the building code law of, for example, Anna, Texas.

In this circuit, the merger doctrine has been applied to the question whether a work was copyrightable at the time of its creation, preventing a copyright from attaching in the first place, rather than as an infringement defense focusing on merger at the time of copying.[44] When we examine SBCCI's

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[43] The merger doctrine is based on 17 U.S.C.A. § 102(b), which states: "In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work."

[44] *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138 n.5 (5th Cir.1992) (citing *Kern River Gas Transmission Co. v. Coastal Corp.*, 899 F.2d 1458, 1460 (5th Cir.1990)).

works *at the times of their creation* and ask whether at that instant they merged with the idea of "building codes," we conclude that the *expression* does not merge instantly with the *idea* because — contrary to Veeck's insistence — there remain many ways to write model building codes, not just one.[45] As amici note, there are at least two other sets of building codes that currently compete with SBCCI's, namely, the National Codes published by Building Officials and Code Administrators International, and the Uniform Codes published by the International Conference of Building Officials. As the Ninth Circuit held in rejecting a similar merger argument in *Practice Management,* the existence of SBCCI's copyright does not stifle independent creative expression by those who would seek to develop "comparative or better coding systems and lobby[ ] government[s] and private actors to adopt them. It simply prevents wholesale copying of an existing system."[46] Neither does the existence of SBCCI's copyrights prevent local governments from adopting codes that do not share SBCCI's unique expressive character or even the same requirements as those contained in its codes,[47] from adopting only parts of the model codes, or from changing them by ordinance.

Public policy also convinces us that application of the merger doctrine should be withheld here. The purpose behind the concept of the merger of *expression* with *idea* is to ensure that copyright protection not extend to ideas. The doctrine applies only when there are few or no other ways of expressing

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[45] *See, e.g., American Dental Ass'n v. Delta Dental Plans Ass'n,* 126 F.3d 977, 979 (7th Cir.1997) (holding that dental association's taxonomy was original work of authorship entitled to copyright protection and stating that "[t]he Code's descriptions don't 'merge with the facts' any more than a scientific description of butterfly attributes is part of a butterfly").

[46] *Practice Management,* 121 F.3d at 520 n.8.

[47] *See American Dental Association,* 126 F.3d at 979-80.

a particular idea.[48] SBCCI's building codes are infused with the opinions of their authors, from the requirements chosen in the codes to their arrangement, level of detail, and grammatical style. We have addressed the policy concerns raised by this case in determining that the building codes do not fall into the public domain once enacted into law. The policy imbedded in the merger doctrine is limited to the separability of idea and expression and is not appropriately applied here.[49] Balancing copyright's competing goals and keeping firmly in mind the language of the Copyright Act, we conclude that merger is not a valid defense for Veeck.

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[48] *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir.1994) (explaining that "when an idea can be expressed in very few ways, copyright law does not protect that expression, because doing so would confer a de facto monopoly over the idea. In such cases idea and expression are said to be merged.").

[49] The global enactment of a code does make that code the law of the enacting municipality and hence, in one sense, a "fact." In the real world, however, as in this case, acknowledging this does not change our analytical approach. Individuals such as contractors who need to use building codes can — and do — quote applicable provisions or incorporate them by reference as needed, for instance, in preparing bids or setting project specifications. That type of use is not before us and cannot be equated to the facts here, involving the gratuitous publication of an entire code. The doctrine of the merger of expression and fact should not be applied to defeat SBCCI's copyright in this case.

3. *Additional Defenses*

a. Free Speech

Veeck raises four additional defenses on appeal.[50] As we turn to the first of these — his First Amendment defense — we emphasize that none contends that SBCCI attempted to use its copyright to block the public's access to the municipal codes of Anna and Savoy, Texas. In *Schnapper v. Foley,* the District of Columbia Circuit held that the First Amendment does not require the voiding of a copyright, even in a government-commissioned work, absent evidence that access to the work had been denied.[51]

Veeck's Free Speech defense is further weakened by the fact that he did not first obtain copies of the codes of these two cities and then publish them on the Internet. Instead, Veeck purchased directly from SBCCI a copy of its 1994 Standard Codes, which arrived bearing a copyright notice and a license agreement. He nevertheless copied that set onto his computer and he posted it on the web, identifying it as containing the municipal codes of the two towns. These two possible courses of action are inherently different: The former is more akin to a citizen's fair use of his local building code;[52] the latter comprehends a purchaser who assumes the risk of actively disregarding the intellectual property rights held and announced by the supplier of a commercial product.

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[50] Another defense, implied license, was raised by amicus curiae Association of American Physicians & Surgeons, Inc., but was not addressed by either party in the district court or on appeal. Hence, we do not address it. *See Christopher M. v. Corpus Christi Indep. Sch. Dist.*, 933 F.2d 1285, 1292 (5th Cir.1991).

[51] 667 F.2d 102, 115-16 (D.C. Cir.1981).

[52] Veeck's fair use defense is discussed further *infra.*

In enforcing its copyright in its model codes, SBCCI is not stifling access to or speech about the law. The First Amendment is not violated here.

b. Misuse

The equity-based defense of copyright misuse, which prevents a culpable plaintiff from prevailing in an action for the infringement of a misused copyright, "'forbids the use of the copyright to secure an exclusive right or limited monopoly not granted by the Copyright Office and which is contrary to public policy to grant.'"[53] In *Practice Management,* the Ninth Circuit found that the American Medical Association misused its copyright by licensing its coding system to the Health Care Financing Administration on the condition that the agency not use any competing system.[54] Veeck, in contrast, has raised no genuine issue of material fact regarding SBCCI's purported misuse of its copyright. The summary judgment record is devoid of evidence that the organization mandates the exclusive use of its codes or any of its other services when a governmental subdivision adopts one of the codes. There is thus no evidence of misuse that would prevent enforcement of SBCCI's copyright.

c. Waiver

Neither can Veeck prevail on his assertion that SBCCI expressly or impliedly waived its right to copyright protection by encouraging municipalities to adopt its codes by reference.

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[53] *DSC Communications Corp. v. DGI Techs., Inc.*, 81 F.3d 597, 601 (5th Cir.1996) (quoting *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 977 (4th Cir.1990)).

[54] *Practice Management*, 121 F.3d at 520.

A right such as copyright may be waived by inaction.[55] Copyright also may be waived as the result of a particular act, even if waiver was not the intended result. [56] Having concluded that SBCCI's codes are not in the public domain and that due process does not require suppression of SBCCI's copyright, we also conclude that the organization has done nothing to waive copyright protection.

SBCCI expressly reserved its copyright in the codes. The district court found undisputed the fact that the materials Veeck received from SBCCI "contained the copyright expressions of the Defendant." The district court also concluded that the fact that SBCCI had given North Carolina Building Inspectors Association permission to publish on the Internet that state's building codes, which are modeled on the SBCCI codes, does not amount to waiver. As the district court noted, "[c]ountless entities provide free access to materials on the Internet and still retain enforcement of their copyrights." SBCCI has not waived its copyright in its model codes.

d. Fair Use

Finally, Veeck argues that his posting of SBCCI's copyrighted material on the Internet constituted a "fair use." Congress has excepted from infringement of copyrighted materials such specified uses as news reporting, teaching, and research.[57] Inferior courts are instructed by the Supreme Court

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[55] *See, e.g., Sherrod v. American Airlines,* 132 F.3d 1112, 1119 n.5 (5th Cir.1998).

[56] *See, e.g., Norma Ribbon & Trimming, Inc. v. Little,* 51 F.3d 45, 48 (5th Cir.1995) ("Therefore, even if it be assumed that the ribbon flowers were copyrightable, the Littles through inadequate notice have made them part of the public domain, and Norma Ribbon was free to copy them.").

[57] *See* 17 U.S.C. § 107 (2000).

to consider four factors in deciding whether a particular use of copyrighted material is a "fair use":

> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work.[58]

When, as with Veeck's activity here, the use of a copyrighted work is noncommercial, defeating a fair use defense requires "proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work."[59]

Even though the use to which Veeck put SBCCI's works is not harmful per se, it could severely undermine the market for those works if such use were to become widespread. Here, there is no genuine dispute, based on the summary judgment record, "that *some* meaningful likelihood of future harm exists."[60] This is not an instance of mere copying of the codes for personal use, or of Veeck's asking SBCCI for permission to post the codes on the web and being denied. Veeck's posting of the codes on the Internet could prove harmful by reducing SBCCI's market and depriving it of income used in its socially

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[58] *Id.; see also Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 577, 114 S.Ct. 1164, 127 L.Ed.2d 500 (1994).

[59] *Sony Corp. v. Universal City Studios*, 464 U.S. 417, 451, 104 S.Ct. 774, 78 L.Ed.2d 574 (1984).

[60] *Id.*

valuable effort of confecting, promulgating, and revising model codes. Having evaluated Veeck's copying under the four statutory factors, the potential harm prevents him from prevailing on a fair use defense.[61]

D. SBCCI's Infringement Counterclaim

SBCCI holds valid copyrights in its codes, and Veeck has expressly admitted copying them. In the absence of a viable defense, the district court was correct in holding that SBCCI established copyright infringement. Under these circumstances, we are convinced that the district court's conclusions and its award of the minimum statutory damages on each of the five counts of copyright infringement are free of error.[62] Likewise, we find no abuse of discretion in the district court's award of attorneys' fees.[63]

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[61] In *Campbell v. Acuff-Rose Music,* while evaluating a fair use defense, the Supreme Court discussed the degree to which a parodist's work transforms a copyrighted original. *See* 510 U.S. at 579, 114 S.Ct. 1164. There, the parodist was the one making the transformation. In contrast, Veeck admits that he did nothing more than copy SBCCI's model codes verbatim; he did not transform them, through parody or otherwise. Therefore, Veeck's argument that the adoption by reference of SBCCI's codes by Anna and Savoy were "transformative" events does not find a home in *Campbell.*

[62] At the pertinent time, 17 U.S.C.A. § 504(c)(1) set the range of statutory damages for each act of copyright infringement at no less than $500 or more than $20,000. A 1999 amendment has raised those amounts to $750 and $30,000, respectively. *Id.*; Digital Theft Deterrence and Copyright Damages Improvement Act of 1999, Pub.L. No. 106-160, § 2(1), 113 Stat. 1774 (1999).

[63] *Hogan Systems, Inc. v. Cybresource Int'l, Inc.,* 158 F.3d 319, 325 (5th Cir.1998) (applying abuse of discretion standard of review to award of attorneys' fees in copyright case). Veeck did not brief the questions of the district court's grant of a permanent injunction or award of damages and attorneys' fees, and therefore waived them.

III.

CONCLUSION

Two decades ago, in *BOCA*,[64] the First Circuit wrestled with the serious issues raised by what was then only a "possible trend" toward state and federal adoption of model codes.[65] That court wisely left open for evaluation the modern realities surrounding technical regulatory codes. As the court wrote, groups that develop such model codes "serve an important public function; arguably they do a better job than could the state alone in seeing that complex yet essential regulations are drafted, kept up to date and made available."[66] The two circuit courts that subsequently addressed challenges similar to that considered by the First in *BOCA* also have declined to invalidate copyrights in works referenced under the law.[67]

In joining three of our sister circuits today, we emphasize that our holding is restricted to the narrow set of facts and circumstances before us. Under these, no one is being denied reasonable access to the SBCCI codes that have been adopted *in globo* by local governments; neither did Veeck's specific actions make a sufficiently strong case for fair use. Even slightly different facts under different circumstances might produce a different result.

Today, the trend toward adoption of privately promulgated codes is widespread, and the social benefit from it is great. Our balancing of the countervailing policy concerns presented in this case ultimately leads us to conclude on these facts that

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[64] 628 F.2d 730.

[65] *Id.* at 736.

[66] *Id.*

[67] *See Practice Management,* 121 F.3d 516; *CCC,* 44 F.3d 61.

copyright protection of privately authored model codes does not simply evanesce *ipso facto* when the codes are adopted by local governments; rather, they remain enforceable, even as to non-commercial copying, as long as the citizenry has reasonable access to such publications cum law. For these reasons, the judgment of the district court is, in all respects,

AFFIRMED.

LITTLE, District Judge, dissenting:

Today the majority concludes that the presumed benefits generated through the creation of "model codes" require that it strike the balance in favor of permitting the model code creator to continue to enforce its copyright, even after such a code has been adopted into law. In my view, once a "model code" is adopted into law by the government, a private entity, such as SBCCI, may no longer obstruct publication and transmission of the law by an uncompensated transferor. Adoption of the model code as law serves to place the law in the public domain and it should, therefore, be readily available for access by all citizens. The access should not be limited to a non-public commercial establishment. Similarly, upon enactment, the law transforms into an "idea" that is no longer distinguishable from its expression, causing SBCCI's codes to lose their copyright protection. It is my belief that reversal of the district court judgment is appropriate. I respectfully dissent from the decision of the majority.

A. Due Process/Public Domain Basis

The majority places great emphasis on the district court's conclusion that no probative evidence exists demonstrating that the codes are not publicly available in North Texas towns. This conclusion, even if factually accurate, is not determinative. The question, in my estimation, is not whether Veeck, or any other

citizen, actually was prevented from viewing the public law, but whether a private entity that develops a code may maintain private control of that law through a copyright.

As the majority correctly observes, not all reproductions of copyrighted work are "within the exclusive domain of the copyright owner; some are in the public domain." *Sony Corp. v. Universal City Studios, Inc.*, 464 U.S. 417, 433, 104 S.Ct. 774, 784, 78 L.Ed.2d 574 (1984). It is well settled that judicial opinions and statutes are in the public domain and are not subject to copyright. As the Supreme Court enunciated in *Banks*, there exist two independent rationales for holding judicial opinions and statutes (and in my opinion, regulations), outside the realm of copyright. While I agree with the majority as to the inapplicability of the first, the "public funds rationale," I strenuously disagree with the majority's disregard of the second, the "public policy/due process" rationale. I also am unable to adopt a meaningful distinction between judicial opinions and statutes, and the regulations that have been promulgated and adopted into law as binding on the citizens of a given community. Today's holding creates a distinction that cannot be sustained.

In *Banks*, the Supreme Court declined to enforce the state reporter's copyright of judicial opinions because "[t]he whole work done by judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all." *Banks*, 128 U.S. at 253, 9 S.Ct. at 40; *see also BOCA*, 628 F.2d at 734-35 (expressing doubt that a private entity that developed a building code was entitled to enforce copyright after the code was enacted into public law on the basis that the public owns the law because it pays the salary of those who draft legislation and the public has the "right to know the law to which it is subject"). Here, SBCCI seeks to prevent an individual from posting, on an internet web site, a

copy[1] of an enacted administrative regulation. The administrative regulation, primarily a building and zoning code, is binding on the public. Sanctions may follow noncompliance. Like a statute, a locality's building regulations are "the authentic exposition" of the law, which the *Banks* Court indicated should be "free for publication to all." *Banks,* 128 U.S. at 253, 9 S.Ct. at 40.

The First Circuit has indicated its approval of this reasoning in a case presenting facts similar to those we measure today. In *BOCA,* the plaintiff, Building Officials and Code Administration ("BOCA"), another code-writing organization, claimed copyright protection for its model building code, which it encouraged public authorities to adopt through a licensing program. *See BOCA,* 628 F.2d at 732. The Commonwealth of Massachusetts adopted and distributed a building code substantially similar to BOCA's model code, pursuant to a licensing agreement with BOCA. *See id.* Massachusetts then referred persons seeking to purchase a copy of the code to BOCA. *See id.* The defendant, Code Technology, Inc. ("CT"), a private publisher, published, and distributed its own edition of the Massachusetts building code. CT's edition was almost identical to BOCA's edition. *See id.* Relying on *Banks* and

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[1] The majority emphasizes that Veeck copied the regulation from a clearly marked, copyrighted edition of SBCCI's model code, rather than, presumably, going to the community in question, obtaining a copy of the regulation, and retyping or scanning that document onto his website. I do not view this as material. As Justice Harlan, sitting as a circuit justice, stated over one hundred years ago, "any person desiring to publish the statutes of a state may use any copy of such statutes to be found in any printed book, whether such book be the property of the state or the property of an individual." *Howell v. Miller,* 91 F. 129, 137 (6th Cir.1898) (refusing to enjoin publication of a competing compilation of state statutes and noting that it would not matter if the defendant had "cut from [the plaintiff's] books the general laws of [the State]").

Wheaton, CT argued that because BOCA's code was adopted by the state as a set of administrative regulations having the force of law, it had lost its copyright protection and thus entered the public domain. *See id.* at 733. BOCA retorted that the building code differed from judicial opinions and statutes because it was written by a privately funded entity and not by the government using public funds. *See id.*

Although the First Circuit declined to rule on the ultimate merit of the plaintiff's case, in vacating the district court's grant of a preliminary injunction to the copyright holder, it noted that it was "far from persuaded that [the plaintiff's] virtual authorship of the Massachusetts building code entitles it to enforce a copyright monopoly over when, where, and how the Massachusetts building code is to be reproduced and made publicly available." *Id.* at 735. The court reasoned that the public "owns the law" not just because it pays the salaries of those who write the statutes and judicial opinions, but because "[t]he citizens are the authors of the law." *Id.* at 734. The court also determined that due process guarantees access to the law because it requires notice of legal obligations. *See id.* It then expressed doubt that due process would allow a private entity to limit access under the copyright law, and to decide for itself when, where, and how the code was to be reproduced and made publicly available. *See id.* at 735. The court ultimately declined to decide the issue, however, remanding to the district court for further proceedings. *See id.* at 736.[2] Finding the *BOCA* analysis compelling, I conclude that a privately

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[2] The First Circuit noted that "since the rule denying copyright protection to judicial opinions and statutes grew out of a much different set of circumstances than do these technical regulatory codes, we think BOCA should at least be allowed to argue its position fully on the basis of an evidentiary record." *BOCA,* 628 F.2d at 736.

developed code is no longer entitled to copyright protection once it enters the public domain.

The majority contends that refusal to enforce SBCCI's copyright would result in a departure from the prior decisions of our sister circuits. On close inspection of those cases, it appears to me that no other circuit has addressed a substantively similar situation to the one before us today. The result I favor would not, therefore, be in discord with the decisions of our sister circuits. *Practice Management* did not reject, outright, the viability of a public domain defense to copyright infringement. In that case, the Ninth Circuit declined to find that the "public domain" argument supported a publisher's attempt to produce its own copy of a medical coding system developed and copyrighted by the American Medical Association, that had been adopted by the federal Health Care Financing Administration for use in Medicare and Medicaid claim forms. *See Practice Management,* 121 F.3d at 517. I note that in *Practice Management,* the party challenging the copyright was a private entity seeking to "share in AMA's statutory monopoly." *Id.* at 519. Had the Ninth Circuit in *Practice Management* been faced with a situation similar to that presented here — where a private individual sought to publish gratuitously a public law for use by other citizens, rather than an instance where a private company sought to invalidate a copyright for its own commercial purposes — it may have decided differently.

It is also apparent that the *Practice Management* court was chary to apply the public domain rationale to defeat a copyright based on the concern that invalidating the AMA's copyright "would expose copyrights on a wide range of privately authored model codes, standards, and reference works to invalidation." *Id.* The Ninth Circuit warned that "'[t]o vitiate copyright, in such circumstances, could, without adequate justification, prove

destructive to the copyright interest in encouraging creativity,' a matter of particular significance in this context because of 'the increasing trend toward state and federal adoptions of model codes.' " *Id.* at 518 (citing 1 Nimmer § 5.06[C], at 5-92 (1996)). Similarly, in *CCC Information Services,* the Second Circuit declined to employ the public domain concept to invalidate a copyright of a car valuation system that had been adopted into some states' insurance codes. The *CCC Information Services* court based its ruling on a public policy-based concern for the ramifications to the copyright holder should the holder be forced to give up its copyright in every instance where the state adopted or referenced its work. *See CCC Info. Servs.,* 44 F.3d at 73-74. Utter disregard of the majority's, as well as the Second and Ninth Circuits', expressed trepidation regarding the viability of standards-writing organizations is not lightly employed.[3] Neither the Second nor the Ninth Circuit, however, was presented with a situation where a private individual sought to publish the law for the sole purpose of sharing it with other citizens. The factual scenario brought before this court leads me to evaluate the public domain rationale in a light different from that utilized by these Circuits. When I balance the protection of original works versus the protection of the public's due process interest, I come down in favor of the public's ability to access the law without private constraints.

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[3] This concern is not without merit. It is undisputed that SBCCI spends considerable time developing its codes, and thus provides a valuable service to local governments that choose to adopt the codes, either in whole or in part. The majority asserts, however, that a refusal to enforce SBCCI's copyright could result in a loss of incentive to create municipal codes. According to the majority, that loss would result in "increased governmental costs as well as the loss of the consistency and quality to which standard codes aspire." I disagree. SBCCI could charge a fair price to a city for code preparation, which a city could then compare to the cost of in-house preparation.

The extent of SBCCI's control over a regulation binding on the public further fortifies Veeck's assertion that a private entity should not be the sole gatekeeper to the public's laws despite the fact that here, copies were available to individuals at city hall or local libraries. The transformation of SBCCI's privately created work into a public law provides grounds to invalidate SBCCI's copyright to the extent that its code is enacted into law. Following along the lines of the reasoning of the First Circuit in *BOCA,* I conclude that the due process concern for public access to the law forbids a private entity from exerting sole control over a public law through a copyright. Consequently, once enacted, the portions of SBCCI's codes that become law enter the public domain and are no longer entitled to copyright protection.

B. Merger and the Idea/Expression Dichotomy

The reasoning implemented in the due process/public domain section of this dissent is sufficient to bolster reversal. Reversal could also be predicated on another, equally potent basis. Veeck has asserted that once adopted, SBCCI's codes become facts that are not protected under the Copyright Act. Further, because the exact language is critical to an enacted law's meaning, the "idea" embodied in the law merges with SBCCI's unique expression. In that case, the copyright becomes unavailing to its owner. SBCCI retorts that citizens are able to produce their own version of the information contained in the model codes and that it is only its particular expression that is protected by the Copyright Act. The district court rejected Veeck's merger argument, finding that the subject of building codes is open to multiple forms of expression. The majority has affirmed this conclusion.

As a preliminary matter, copyright protection is not extended to facts, procedures, processes, methods of operation,

or information in the public domain. *See* 17 U.S.C. § 102(b); *Feist Publications, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 350, 111 S.Ct. at 1290; *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 547-48, 105 S.Ct. 2218, 2223-23, 85 L.Ed.2d 588 (1985); *Kepner-Tregoe, Inc. v. Leadership Software, Inc.*, 12 F.3d 527, 533 (5th Cir.1994). Similarly, a copyright protects the expression of ideas, not the ideas themselves. *See Kepner-Tregoe,* 12 F.3d at 533. "[I]n order to protect the immunity of ideas from private ownership, when the expression is essential to the statement of the idea, the expression also will be unprotected, so as to insure free public access to the discussion of the idea." *CCC Info. Servs.*, 44 F.3d at 68. Where an idea is susceptible only to one form of expression, the merger doctrine applies and the expression will not be protected by the Copyright Act. *See* 17 U.S.C. § 102(b); *Kepner-Tregoe,* 12 F.3d at 533; *Mason v. Montgomery Data, Inc.*, 967 F.2d 135, 138-40 (5th Cir.1992). This "idea/expression dichotomy 'strike [s] a definitional balance between the First Amendment and the Copyright Act by permitting free communication of facts while still protecting an author's expression.'" *Harper & Row,* 471 U.S. at 556, 105 S.Ct. at 2228 (citing, with approval, the Second Circuit's discussion of the copyright protection afforded to an idea versus its expression in *Harper & Row Publishers, Inc. v. Nation Enters.*, 723 F.2d 195, 203 (2d Cir.1983)). There is no bright-line test for determining whether an idea is distinguishable from its expression. The merger, or lack of it, should be determined based on the facts of the case. *See Country Kids 'N City Slicks, Inc. v. Sheen,* 77 F.3d 1280, 1285 (10th Cir.1996). It is appropriate for the court to incorporate policy choices into its merger analysis, including the public's interest in free access to the law. *See CCC Info. Servs.*, 44 F.3d at 68.

I agree with the majority that prior to adoption by local municipalities, SBCCI's model codes are entitled to copyright protection. Although no court has held decisively that the merger doctrine may be used to invalidate a copyright in a privately developed code that is enacted into law, there is merit to Veeck's argument that *once enacted,* the codes do become a fact or idea, in that there is only one accurate way to express an enacted law. The majority fails to explain how, once a model code is adopted as law, either in whole or in part, there exists any other way of expressing *the law.*[4] In *CCC Information Services,* the Second Circuit declined to invalidate the plaintiff's copyright interest in its Red Book car valuation that had been adopted into the state's insurance code, but explicitly acknowledged that the defendant's merger argument "is not easily rebutted." *Id.* at 68. The Second Circuit ultimately rejected the merger doctrine based on "the need, where elements of the copyright law conflict, to determine, as a policy judgment, which of its commands prevails over the other." *Id.* The court concluded that the fundamental principle of copyright law of granting authors exclusive rights to their writings outweighed the policy benefit of preserving public access to ideas. *See id.* at 68-72. Here, I conclude that the policy benefit of preserving unfettered public access to the law outweighs the interest of permitting the holder of a copyright in a "model

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[4] While the majority acknowledges that "[t]he global enactment of a code does make that code the law of the enacting municipality and hence, in one sense, a 'fact,'" it steadfastly maintains that Veeck's use cannot be saved by the merger doctrine. The majority would, however, hold harmless certain individuals quoting certain sections of the law for a particular purpose, such as "contractors who need to use building codes." It is difficult indeed to distinguish between this use and that of Veeck. It is beyond peradventure that Veeck posted the building codes on the internet site as a service to the general public, a class which may include contractors and home builders.

code" to maintain that copyright subsequent to the code's adoption into law.

By its very nature, an enacted law enters the public realm as a concrete, definite fact/idea. There is only one accurate way to express a law. Courts consistently stress that, as a preliminary matter, the exact words of a statute govern its interpretation. *See, e.g., Kennedy v. Texas Utils.*, 179 F.3d 258, 261 (5th Cir.1999) ("'The starting point for interpreting a statute is the language of the statute itself.'" (citing *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980))); *City of Sherman v. Pub. Util. Comm'n,* 643 S.W.2d 681, 684 (Tex.1983) ("Generally the intent and meaning [of the legislature] is obtained primarily from the language of the statute" (citing *Magnolia Petroleum Co. v. Walker,* 125 Tex. 430, 83 S.W.2d 929, 934 (Tex.1935))). The importance of examining the precise language of a statute in order to glean its meaning demonstrates the concrete, inflexible nature of a statute's language once it is enacted into law. The same concept applies to an administrative regulation, such as a building code. An individual attempting to gain access to the building code of Anna or Savoy, Texas has only one choice — it must view the enacted version of SBCCI's model code. This is a case where the merger doctrine is especially appropriate because other methods of expressing the idea are foreclosed. *See Educ. Testing Servs. v. Katzman,* 793 F.2d 533, 539 (3d Cir.1986) (citing *Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1253 (3d Cir.1983)). An individual wishing to publish the text of a law cannot develop his own, unique version and still publish an authoritative copy.

Moreover, it is antithetical to our nation's concept of public participation for a private entity to monopolize the public laws. *See generally Kepner-Tregoe,* 12 F.3d at 533 (justifying the

merger doctrine on the basis that no one should be given a monopoly over an idea). Congress could not have intended for a private organization to be given the exclusive right to control others' ability to copy and distribute an enacted law. Even the towns themselves apparently keep relevant portions of the SBCCI code as the official version.

I am not dissuaded from applying merger in this case by the Second Circuit's opinion in *CCC Information Services.* That court did not discuss, with any detail, the issue of whether a copyrighted work would merge with its underlying idea when enacted into law. Instead, the court was concerned with whether the ideas expressed in a compilation of informational matter were entitled to copyright protection. Here, in contrast, our focus is on the adoption of the copyrighted work into law. I would agree with Veeck that once adopted, SBCCI's model code becomes a concrete fact that is outside the realm of copyrightable works under section 102(b) of the Copyright Act. *See Feist,* 499 U.S. at 356, 111 S.Ct. at 1293 (explaining that section 102(b) is "universally understood to prohibit any copyright in facts"). This same consideration convinces me that once SBCCI's code is enacted by reference into law, the "ideas" embodied in the law merge with SBCCI's original creation, causing the model code to lose its copyright protection.

SBCCI spends thousands of hours developing its codes, providing a valuable service to governments that choose to adopt the model codes as their own. The majority has embraced the arguments set forth by SBCCI that its economic future will be compromised if citizens, such as Veeck, are able to post copies of copyrighted codes on the internet. This argument lacks merit. As SBCCI itself points out, private citizens are already permitted to copy SBCCI's code from the municipality at City Hall. As such, citizens are able to avoid having to buy SBCCI's codes from the organizations by viewing a copy at a

local government office or library. It is illogical for SBCCI to argue that its viability is threatened if a private individual is able to copy the law to share with others because these others could just as easily access the information from the local government without arousing SBCCI's protestation. The minute burden that might befall the standards-writing organizations because of the actions of Veeck and others like him is outweighed by the benefit of Veeck's act of enhancing unfettered access to the law.

Based on the foregoing discussion, I would hold that once a "model code" is adopted into law by the government, a private entity, such as SBCCI, may no longer assert a copyright over the law's content, for the law enters the public domain and should be readily available for access by all citizens. Further, upon enactment, the law transforms into an "idea" that is no longer distinguishable from its expression, causing SBCCI's codes to lose their copyright protection. For these reasons, I would reverse the judgment of the district court.

I respectfully dissent from the majority's contrary conclusion.

APPENDIX C
DISTRICT COURT OPINION

United States District Court,
Eastern District of Texas,
Sherman Division.

Peter VEECK, d/b/a Regional Web,
Plaintiff-Counter Defendant,

v.

SOUTHERN BUILDING CODE
CONGRESS INTERNATIONAL, INC.,
Defendant-Counter Claimant.

No. 4:98cv63.
March 24, 1999.

MEMORANDUM OPINION AND ORDER

FOLSOM, District Judge.

Came on for consideration the cross-Motions for Summary Judgment in the above entitled cause. National Fire Protection Association filed an Amicus Curiae brief in support of the Defendant, Southern Building Code Congress International, Inc. ("SBCCI"). Henry H. Peritt, Jr., filed an *Amicus Curiae* brief in support of Plaintiff, Peter Veeck. The Court held a hearing on the motions on October 14, 1998. Leave to file supplemental briefs was granted to both parties and National Fire Protection Association. Having considered the Motions, the Responses, the Briefs, the arguments at the hearing, and the applicable law, the Court finds the following.

I. BACKGROUND

SBCCI, is a not-for-profit organization whose existence is to promote and promulgate standards which safeguard life, health, and public welfare for all types of buildings and constructions. Since 1940, SBCCI's primary mission has been to develop and maintain a set of model building codes known as the Standard Building Codes. These codes include the Standard Building Code, Standard Plumbing Code, Standard Gas Code, Standard Fire Prevention Code, and Standard Mechanical Code. The cities of Anna and Savoy, Texas, under expressed agreements with SBCCI, have enacted ordinances adopting SBCCI's model codes by reference.

Peter Veeck, owns and operates a website known as Regional Web which provides free access via the Internet to information by or about the area of Texas north of Dallas. This information also contains some of the areas municipal codes and ordinances. Mr. Veeck purchased the 1994 version of SBCCI's model codes on electronic format from SBCCI. He then used the software included with the product, loaded the product on his computer, and cut and pasted the data. He then published the edited material on his webpage as the municipal codes of Anna and Savoy, Texas. Mr. Veeck used a telephone to order the codes and purchased the codes by use of a credit card.

II. SUMMARY JUDGMENT STANDARD

The current standards for reviewing a motion for summary judgment were established in the Supreme Court's trilogy of *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986), *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) and *Matsushita Electrical Industrial Co. Ltd.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986); see also *Topalian*

v. Ehrman, 954 F.2d 1125 (5th Cir.1992), *cert denied*, 506 U.S. 825, 113 S.Ct. 82, 121 L.Ed.2d 46 (1992). Summary judgment is appropriate when the movant can demonstrate that the evidence, including pleadings and affidavits, establishes that there are no genuine issues of material fact. Fed. R. Civ. P. 56(c). Once the movant produces such evidence, the nonmovant must come forward with competent evidence that controverts the material facts of the claim at issue. See *Topalian*, at 1131. A dispute about a material fact is "genuine" if the evidence would permit a reasonable jury to return a verdict for the nonmoving party. See *Anderson*, 477 U.S. at 248, 106 S.Ct. 2505. Simply stated, the Court must decide whether the result of submitting these matters to the trier of fact would be preordained. See *Society of Financial Examiners* v. *National Association of Certified Fraud Examiners*, 41 F.3d 223, 226 (5th Cir.1995).

Mr. Veeck contends that SBCCI, by allowing the use of its model codes by municipalities, has allowed such codes to become part of the public domain and not subject to copyright protection. In essence, Mr. Veeck proposes that there are four grounds for finding lack of copyright protection: (1) due process and access to the law, (2) the fact/idea-expression merger, (3) misuse, and (4) waiver. As contained in its counterclaim and cross-motion, SBCCI argues that Mr. Veeck has violated the copyrights in its codes.

III. DISCUSSION

A. Banks and Due Process

Mr. Veeck asserts that SBCCI's standardized codes became law and thus entered the public domain when the municipalities by adoption as local law required their enforcement. This argument rest ultimately upon *Banks* v. *Manchester*, 128 U.S. 244, 9 S.Ct. 36, 32 L.Ed. 425 (1888), which held that judicial

opinions are uncopyrightable. *Banks* in turn rests upon two grounds, neither of which would justify invalidation of SBCCI's copyright protection. See *Practice Management Information Corporation v. The American Medical Association*, 121 F.3d 516, 518 (9th Cir.1997), *cert. den.*, 522 U.S. 933, 118 S.Ct. 339, 139 L.Ed.2d 263 (1997). The Ninth Circuit, in Practice Management, explained those two grounds and why the *Banks* Court held that judicial opinions are not subject to copyright: (1) the public owns the opinions because it pays the judge's salaries, and (2) as a matter of public policy, the whole work done by the judges constitutes the authentic exposition and interpretation of the law, which, binding every citizen, is free for publication to all. *Practice Management*, 121 F.3d at 518.

With regard to factor number one, there is no question that SBCCI is a private non-profit corporation which carries out research, compiles data, drafts standardized codes, and then prints them in a usable fashion for its customers. Further, SBCCI offers services in conjunction with the printing of its codes to assist the reader in better understanding its codes. SBCCI bears the financial weight of this process. The only public money used to facilitate SBCCI's work is that income derived from the sale of SBCCI's product. As such, the public does not own SBCCI or its works.

Further, the copyright system's goal of promoting the arts and sciences by granting temporary monopolies to copyright holders was not at stake in *Banks*. *Practice Management*, 121 F.3d at 518. In contrast, the production of the standardized codes provides the economic incentive for SBCCI to produce and maintain the standardized codes. *Id.* As the Ninth Circuit stated. "To vitiate copyright, in such circumstances, could, without adequate justification, prove destructive of the copyright interest, in encouraging creativity, a matter of

particular significance in this context because of the increasing trend toward state and federal adoptions of model codes." *Practice Management*, 121 F.3d at 518 (citations omitted). As SBCCI and National Fire Protection Association point out, invalidating or not enforcing these copyrights on the ground that the standardized codes entered the public domain when the municipalities adopted them as law would expose copyrights on a wide range of privately authored model codes, standards, and reference works to jeopardy. *Id.* at 519. As the Ninth Circuit stated, "Non-profit organizations that develop these model codes and standards warn they will be unable to continue to do so if the codes and standards enter the public domain when adopted by a public agency." *Id.* Agreeing with these assertions, the Court finds that the first *Banks* element is not met in the present case.

The second element, one of public policy, also dictates that SBCCI's copyright in its standardized codes are enforceable. *Banks* and Mr. Veeck rely upon the *due process* requirement of free access to the law. Mr. Veeck argues that it is necessary to publish the standardized codes on the Internet in order to provide free access of the law to the public. Mr. Veeck states that the codes in question are not otherwise generally available. The Court finds these assertions without merit.

What Mr. Veeck really asserts is that the model codes are not available to him in the most convenient manner. Mr. Veeck's own actions of ordering the model codes directly from SBCCI establish that the codes can be obtained over the telephone, just as Mr. Veeck proposes with the Internet where a fee would also be incurred by the citizen. See Oral Deposition of Peter Veeck, at 30 (discussion on service charges for Internet providers). Further, the evidence presented by SBCCI and through Mr. Veeck establishes that Mr. Veeck did obtain access to the municipal codes. To illustrate, when he did obtain access

to the Denison, Texas, municipal ordinance, he realized he had ordered the 1994 version of SBCCI's standardized codes, yet Denison had adopted the 1988 version. See Oral Deposition of Peter Veeck, at 90. Similarly, Mr. Veeck learned when he traveled to Anna, Texas, that the City of Anna had adopted the 1994 version of SBCCI's standardized codes. *Id.* at 100. More importantly, Mr. Veeck believed that the City of Anna would have a copy of the SBCCI codes, but he did not ask for them or for access to them. *Id.* at 102-103. In fact, other than the City of Savoy, where Mr. Veeck was told a copy of the codes were at "public works," there was no other municipality where he looked where he could not locate the codes. *Id.* at 108-109.

The evidence presented by SBCCI establishes that in the cities of Sherman and Denison, Texas, the model codes as adopted by these municipalities are available to the public. The Court is satisfied that the citizens of the communities wherein these codes have been adopted do have access to them. There is no evidence that Mr. Veeck was personally denied access to any of these codes or that others have been denied access to the codes. As such, the Court finds that Mr. Veeck's assertions of violations of due process and lack of access are without merit and no genuine issue of material fact exists in his claims. The Court finds that *Banks* is clearly distinguishable to the present case or scenario as stated above. Accordingly, the Court finds that SBCCI's works should be afforded their copyright protection.[1]

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[1] As indicated by National Fire Protection Association, no case directly (or indirectly as the Court views the case law) supports the Plaintiff's view that a copyrighted work when incorporated into the law eliminates the copyright protection of the maker of that work. As the Second Circuit stated and this Court agrees, "We are not prepared to hold that a state's reference to a copyrighted work as a legal standard ... results in loss of the copyright." *CCC Info. Serv. Inc.* v. *Maclean Hunter Market Reports, Inc.*, 44 F.3d 61, 73-74 (2d Cir.1994). While Plaintiff has raised policy considerations, "they

The Fifth Circuit has also addressed the arguments of Mr. Veeck in favor of SBCCI. In *State of Texas* v. *West Publishing Company*, 882 F.2d 171, 177 (5th Cir.1989), the State of Texas argued that it had "an obligation under the due process clause to provide its residents with access to its laws and that West's copyright impinges on this obligation" because West had the only "accessible" version of the statutory law. The Fifth Circuit found the State's argument to be without merit, stating that Texas residents have ready access to the law (as the municipal residents do in this case) and that there was no evidence that anyone was "being denied access to [the law] or that West intends to deny access in the future." *Id.* As this Court has found, the residents of these municipalities "are not being deprived of any due process right they could conceivably have to access [municipal] laws." *Id.* Further, if Mr. Veeck's access to the codes is slightly limited by "enforcement of [SBCCI's] copyright against ... wholesale copying, this will not inflict injury on the opportunity for public debate, nor restrict access to the kind of idea that illuminates our understanding of the phenomena that surround us or of useful processes to solve our problems." *CCC Info. Serv. Inc.*, 44 F.3d at 73.

The Court specifically notes that this is not a case where a citizen was denied any access to the law as adopted by the municipalities in question. The Court further finds that this is not a case where a citizen desired to photocopy the codes at a municipal office and was denied that access. The Court further finds that this is not a case where Mr. Veeck simply copied the codes from the municipal offices and SBCCI now seeks to

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are opposed to the countervailing considerations." *Id.* at 74. Such countervailing considerations include substantial problems under the Takings Clause of the Constitution and a chilling effect on non-profit organizations conducting the research and testing of such codes. This is especially so in light of the fact that the present case reveals no denial to access.

prevent that action. Rather, Mr. Veeck ordered the SBCCI standardized codes directly from SBCCI and published those specifically copyrighted works on the Internet.

B. Fact/Idea-Expression Merger

Similarly, the Court finds that the fact/idea-expression merger proposed by Mr. Veeck is not appropriate to this case. See *American Dental Association* v. *Delta Dental Plans Association*, 126 F.3d 977, 979 (7th Cir.1997) (holding, dental association's taxonomy was original work of authorship entitled to copyright protection, and taxonomy was not uncopyrightable "system," and stating, "The Code's descriptions don't 'merge with the facts' any more than a scientific description of butterfly attributes is part of a butterfly.") (citations omitted). A copyright protects the expression of an idea but not the idea itself. Under the merger doctrine, however, expression is not protected when there are no or few other ways of expressing a particular idea. *Educational Testing Servs.* v. *Katzman*, 793 F.2d 533, 539 (3d Cir.1986). Such is not the situation in the present case where model building codes can be and are planned, developed, and published by a number of non-profit organizations. If the same idea can be expressed in a plurality of totally different manners, a plurality of copyrights may result. *Id.* at 539. The evidence shows that other methods of expressing these ideas are not foreclosed as a practical matter. *Id.* at 539. Accordingly, there is no merger. SBCCI's model codes are but one way of expressing an idea, but its codes are not the only way of expressing that same idea. The Court finds that the subject of building codes is open to a number of different types of expressions. Therefore, the Court finds that no merger of fact/idea and expression have occurred to prevent SBCCI from enforcing its copyrighted works.

C. Misuse

The Court also finds that SBCCI has not misused its copyrights. See *American Dental Association*, 126 F.3d at 981 (stating, "So far as the ADA is concerned, any dentist, any insurer, anyone at all, may devise and use forms into which the Code's descriptions may be entered. The ADA encourages this use; standardization of language promotes interchange among professionals."). SBCCI is a nonprofit corporation and has a membership base consisting of approximately 14,500 members. See Affidavit of William J. Tangye. Of this 14,500 members, about 2,400 are government entities, consisting of cities, counties, and state governments. *Id.* As the organization which maintains the standard codes, SBCCI claims copyright interest in the codes and each title is registered in the Copyright Office. *Id.* These codes are offered for adoption as local construction ordinances to any local government, at no cost, and with no obligation on the part of the government unit to become a member of SBCCI. *Id.* The total cost of preparation, promulgation, and maintenance of the codes is borne by SBCCI, which includes the input of thousand of design professionals, building contractors, building officials from all over the country, construction industry groups, trade associations, and other interested citizens. *Id.* It is from this pool of knowledge and expertise, compiled in a readily usable and understandable form, that the codes are offered to the local governments at no cost to the public. SBCCI does not mandate the use of their codes nor are the other services of SBCCI required upon adoption of the codes. See *Practice Management*, 121 F.3d at 521 (holding misuse of copyright because of limitations imposed on licensing agreement). The Court finds that there exists no misuse of SBCCI's copyrights with regard to allowing municipalities involved in this case to adopt by reference its standardized codes.

D. Waiver

Mr. Veeck asserts that SBCCI has waived its right to copyright protection in the standardized codes because SBCCI encourages municipalities to adopt their codes by reference. This Court disagrees. Waiver requires the existence of a right or privilege which may be waived, the actual or constructive knowledge thereof, and an intention to relinquish such right or privilege. *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir.1982). A waiver may be expressed or implied from conduct. *Id.* However, when a waiver is implied from conduct, "the acts, conduct, or circumstances relied upon to show waiver must make out a clear case." *Id.* The facts of the present case reveal no express waiver. The Court further finds no implied waiver. To the contrary, SBCCI expressly reserved its copyright in the codes adopted by reference by the municipalities. Further, the materials which Mr. Veeck actually received from SBCCI contained the copyright expressions of the Defendant. In addition, the Court agrees with National Fire Protection Association's statement that the fact that SBCCI chooses to provide free access to its copyrighted works in North Carolina is irrelevant to this case. Countless entities provide free access to materials on the Internet and still retain enforcement to their copyrights.

E. Fair Use

Under the provisions of 17 U.S.C. § 107, the Court finds that Mr. Veeck's use of SBCCI's copyrighted works did not amount to a "fair use." A challenge to a noncommercial use of a copyright work requires "proof either that the particular use is harmful, or that if it should become widespread, it would adversely affect the potential market for the copyrighted work." *Sony Corp.* v. *Universal City Studios*, 464 U.S. 417, 451, 104 S. Ct. 774, 78 L.Ed.2d 574 (1984). Actual present harm need not be shown, and it is not necessary to show with certainty that future harm will result. *Id.* The burden is on the copyright

holder to show by a preponderance of the evidence "that some meaningful likelihood of future harm exists." *Id.* SBCCI has more than demonstrated that this particular use by Mr. Veeck and the affect of widespread use in this manner would be harmful and adversely affect the potential market for the copyrighted works of SBCCI. The Court finds a present harm and that there exists a meaningful likelihood of future harm to SBCCI. The Court has explored the remaining factors of § 107 and finds that in light of the purposes of the copyrights at issue, a "fair use" by Mr. Veeck is not found.

F. SBCCI's Infringement Claim

The Court finds that SBCCI does hold enforceable copyrights to the standardized codes. The Court further finds that Mr. Veeck purchased those codes directly from SBCCI. The Court finds that the materials purchased by Mr. Veeck contained information with regard to SBCCI's copyrights. Mr. Veeck has admitted that he copied the codes from SBCCI's materials and published them on his website. See Oral Deposition of Peter Veeck, at 36 and 52. As such the Court finds there is more than a substantial similarity between SBCCI's works and the edited version which Mr. Veeck published on the Internet. A copyright infringement action requires the plaintiff to prove ownership of a valid copyright and copying by the defendant. *Lakedreams* v. *Taylor*, 932 F.2d 1103, 1107 (5th Cir.1991). The Court finds these elements have been met in this case by SBCCI. In essence, Mr. Veeck did not publish the law. Mr. Veeck ordered a copyrighted work from SBCCI, edited it for his use, and the published the material to those members of the public who may have Internet access. As such, Mr. Veeck violated the copyrights of SBCCI.

There are a total of five copyright infringements in this case. SBCCI's five separate copyrighted works at issue are as

follows: Standard Plumbing Code, 1994 Edition (Registration Number TX 3-956-811); Standard Building Code, 1994 Edition (Registration Number TX 3-911-096); Standard Fire Prevention Code, 1994 Edition (Registration Number TX 3-921-392); Standard Mechanical Code, 1994 Edition (Registration Number TX 3-916-634); and Standard Gas Code, 1994 Edition (Registration Number TX 3-922-545). While Mr. Veeck in his Answers to the SBCCI's Counter-Claims denied that he published SBCCI's copyrighted model codes, he has admitted that he published the codes enacted by various cities and towns in north Texas which adopt such models by reference. See also Affidavit of Brad Ware, Exhibit 7 of Defendant's Motion for Summary Judgment. Since the Court has determined that this publication infringed the copyrights of SBCCI, Mr. Veeck is liable for five infringements of SBCCI's copyrighted works.

G. Remedies

Permanent Injunction

This Court has authority to grant "temporary and final injunctions on such terms as it may deem reasonable to prevent or restrain infringement of a copyright." 17 U.S.C. § 502(a). Courts have traditionally granted "permanent injunctions where a continuing threat of copyright infringement exists and liability has been established." *Central Point Software, Inc.* v. *Nugent*, 903 F. Supp. 1057, 1060 (E.D.Tex.1995). Liability has been established in this case, and the Court finds that a continuing threat of copyright infringement does exist. Therefore, the Plaintiff, Mr. Veeck, is permanently enjoined from interfering with any of SBCCI's copyrights, including but not limited to, unauthorized use, copying and/or distribution of SBCCI's standardized codes, "posting" or publishing of SBCCI's standardized codes on the Internet, continued posting or publishing of SBCCI's standardized codes on the Internet, and

from encouraging and aiding others to commit such acts. SBCCI's request for a permanent injunction in this matter is GRANTED.

Statutory Damages

SBCCI has elected to recover an award of statutory damages under 17 U.S.C. § 504(c). Under this provision, the Court may award any amount in a sum of "not less than $500 or more than $20,000 as the court considers just." 17 U.S.C. § 504(c)(1). Within that range defined by the statutory maximum and minimum, "the court has virtually unfettered discretion in setting the damage award." *Playboy Enterprises, Inc.* v. *Webbworld, Inc.*, 991 F. Supp. 543, 560 (N.D.Tex.1997), *aff'd*, 168 F.3d 486 (5th Cir.1999). Where the suit involves infringement of more than one separate and independent work, as in this case, "minimum statutory damages for each work must be awarded." *Broadcast Music, Inc.* v. *Xanthas, Inc.*, 855 F.2d 233, 236 (5th Cir.1988). Damages, however, may not be awarded under § 504(c) "without a hearing or a demonstration by detailed affidavits establishing the necessary facts." *Id.* at 237. The Court finds that a demonstration by detailed affidavits establishes the necessary facts in this case to award SBCCI as Counterclaimant an amount of $500 for each of the five violations, for a total of $2,500. The Court bases this determination on the fact that Mr. Veeck has not profited from the publishing of these codes and SBCCI has not provided any evidence that Mr. Veeck profited from the publication of these codes. See *Playboy*, 991 F. Supp. at 561 (stating, "Copyright infringement, however, must not be allowed to serve as the cornerstone of a profitable business."). Because $2,500 is just and reasonable in this case, and falls within the statutory guidelines of § 540(c), the Court AWARDS $2,500 in total statutory damages to SBCCI. SBCCI's request for statutory damages as indicated above is GRANTED.

Costs and Attorneys' Fees

SBCCI has requested this Court grant it attorneys' fees. Within the Court's discretion, attorneys' fees may be awarded to a prevailing party pursuant to 17 U.S.C. § 505. Although attorney's fees are awarded in the trial court's discretion, "they are the rule rather than the exception and should be awarded routinely." *Micromanipulator Co., Inc. v. Bough*, 779 F.2d 255, 259 (5th Cir.1985). Therefore, the Court finds that an award of attorneys' fees to SBCCI is appropriate in this case. However, the Court desires affidavits to be filed to determine the appropriate amount of a fee. SBCCI will have ten (10) days from the date of this Order to file an Affidavit on the matter of attorneys' fees. Mr. Veeck will be allowed five (5) days to respond to said Affidavit.

IV. ORDER

This matter is before the Court for consideration of cross-motions for Summary Judgment filed by the Plaintiff and the Defendant. The Court having thoroughly reviewed this matter, having set forth its findings in a Memorandum Opinion, and being otherwise sufficiently advised, it is hereby

ORDERED, ADJUDGED, AND DECREED that Plaintiffs' Motion for Summary Judgment is be DENIED. It is further

ORDERED that Defendant's Motion for Summary Judgment is GRANTED. It is further

ORDERED that final judgment in accordance with this Opinion and Order will be entered in favor of the Defendant/Counterclaimant. It is further

ORDERED that the Defendant/Counterclaimant shall submit affidavits on the issue of an appropriate attorneys' fee award within ten (10) days from the date of this Order. It is further

ORDERED that the Plaintiff shall submit affidavits on the issue of an appropriate attorneys' fee award within five (5) days after the Defendant/Counterclaimant's submission.

APPENDIX D
STATUTORY PROVISIONS

1. The Copyright Act provides in pertinent part:

17 U.S.C. § 101

"* * * *

A 'work of the United States Government' is a work prepared by an officer or employee of the United States Government as part of that person's official duties.

* * * "

17 U.S.C. § 105

"Copyright protection under this title is not available for any work of the United States Government, but the United States Government is not precluded from receiving and holding copyrights transferred to it by assignment, bequest, or otherwise."

17 U.S.C. § 201

"(a) Initial Ownership.—Copyright in a work protected under this title vests initially in the author or authors of the work. The authors of a joint work are coowners of copyright in the work.

* * *

"(e) Involuntary Transfer.—When an individual author's ownership of a copyright, or of any of the exclusive rights under a copyright, has not previously been transferred voluntarily by that individual author, no action by any governmental body or other official or organization purporting to seize, expropriate, transfer, or exercise rights of ownership with respect to the copyright, or any of the

exclusive rights under a copyright, shall be given effect under this title, except as provided under title 11."

2. The National Technology Transfer and Advancement Act of 1995, Pub. L. No. 104-113 § 12(d), 110 Stat. 775, codified at 15 U.S.C. § 272 Note, provides in pertinent part:

> **"(d) Utilization of Consensus Technical Standards By Federal Agencies; Reports.—**
>
> "(1) In general.—Except as provided in paragraph (3) of this subsection, all Federal agencies and departments shall use technical standards that are developed or adopted by voluntary consensus standards bodies, using such technical standards as a means to carry out policy objectives or activities determined by the agencies and departments.
>
> "(2) Consultation; participation.—In carrying out paragraph (1) of this subsection, Federal agencies and departments shall consult with voluntary, private sector, consensus standards bodies and shall, when such participation is in the public interest and is compatible with agency and departmental missions, authorities, priorities, and budget resources, participate with such bodies in the development of technical standards.
>
> "(3) Exception.—If compliance with paragraph (1) of this subsection is inconsistent with applicable law or otherwise impractical, a Federal agency or department may elect to use technical standards that are not developed or adopted by voluntary consensus standards bodies if the head of each such agency or department transmits to the Office of Management and Budget an explanation of the reasons for using such standards. * * * "